Westlaw.

128 P.3d 588

156 Wash.2d 403, 128 P.3d 588

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C

Supreme Court of Washington,
En Banc.
CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a regional transit authority,
d/b/a Sound Transit, Respondent,
v.
Kenneth R. MILLER and Barbara I. Miller, husband and wife, and Miller Building Enterprises, Inc., a Washington corporation,
Appellants,
Northwest Community Bank, Designated Trustee Services, Inc., Bertram P. Weinman and Myra Weinman, Trustees of the Weinman Family Trust, Alan J. Wrye and Pansy D. Wrye, Vivian Bartlett, and All Unknown Owners and All Unknown Tenants,
Defendants,
Pierce County, a municipal corporation,
Respondent.
No. 76284-8.

Argued May 26, 2005.
Decided Feb. 16, 2006.

Background: Regional transit authority initiated condemnation proceeding for land for use in light rail project. In public use and necessity hearing, the Superior Court, Pierce County, Kathryn J. Nelson, J., found for authority. Landowners sought direct review, which the Supreme Court granted.

Holdings: The Supreme Court, Fairhurst, J., held that:
(1) authority's notice of public hearing to select property, posted on its web site, was adequate;
(2) notice was sufficiently specific; and
(3) historical nature of property did not render authority's finding of necessity to condemn property arbitrary or capricious.

Affirmed.

Alexander, C.J., filed a dissenting opinion, in which Chambers, J., joined.

J.M. Johnson, J., filed a dissenting opinion, in which Sanders, J., joined, and in which Chambers, J., concurred in result.

West Headnotes

[1] Eminent Domain ⚿1
148k1 Most Cited Cases
The power of eminent domain is an inherent attribute of sovereignty. U.S.C.A. Const.Amend. 5 ; West's RCWA Const. Art. 1, § 16.

[2] Eminent Domain ⚿3
148k3 Most Cited Cases

[2] Eminent Domain ⚿166
148k166 Most Cited Cases
The power of eminent domain is limited by the constitution and must be exercised under lawful procedures. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[3] Eminent Domain ⚿166
148k166 Most Cited Cases
Once a state agency with the power of eminent domain has made the initial determination that condemnation is necessary, the matter moves into court for a three-stage proceeding: first, there must be a decree of public use and necessity, second, just compensation must be determined, and finally, just compensation must be paid and title transferred. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[4] Eminent Domain ⚿67
148k67 Most Cited Cases
Whether condemnation is necessary is largely a question for the legislative body of the jurisdiction

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Documents:	1
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or government agency seeking condemnation. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[5] Eminent Domain 67
148k67 Most Cited Cases
A legislative body's declaration of necessity for condemnation is conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[6] Eminent Domain 56
148k56 Most Cited Cases
In the condemnation context, "necessary" means reasonable necessity under the circumstances; it does not mean immediate, absolute, or indispensable need. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[7] Eminent Domain 67
148k67 Most Cited Cases
Out of respect for the coordinate branches of government, judicial review is deferential for a legislative decision that condemnation is necessary. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[8] Eminent Domain 56
148k56 Most Cited Cases

[8] Eminent Domain 182
148k182 Most Cited Cases
Although personal notice of the public meeting establishing necessity for a condemnation is not required either by the statute or due process, personal notice is required to begin the three-step condemnation proceeding. U.S.C.A. Const.Amends. 5, 14; West's RCWA Const. Art. 1, § 16.

[9] Eminent Domain 55
148k55 Most Cited Cases
Regional transit authority's notice of public hearing to select property to be condemned for light rail project, posted on its web site, was adequate; web site was readily available to public and was at least as likely to provide community with notice as methods listed in notice statute, such as newspapers. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16; West's RCWA 35.22.288, 81.112.080(2).

[10] Eminent Domain 262(1)
148k262(1) Most Cited Cases
Procedural errors in condemnation proceedings, such as lack of proper notice, are questions of law reviewed de novo. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[11] Eminent Domain 196
148k196 Most Cited Cases
As party challenging adequacy of notice of public hearing for condemnation of land for light rail project, landowners bore burden of proof that notice was defective. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16; West's RCWA 35.22.288, 81.112.080(2).

[12] Eminent Domain 56
148k56 Most Cited Cases
The purpose of notice statutes for public meeting establishing necessity for a condemnation is to apprise fairly and sufficiently those who may be affected of the nature and character of an action so they may intelligently prepare for the hearing. West's RCWA 35.22.288, 81.112.080(2).

[13] Eminent Domain 55
148k55 Most Cited Cases
By stating intent to purchase property for light rail project, regional transit authority's notice of public hearing, posted its web site, was sufficiently specific to put property owners on notice that condemnation of land in area was to be considered. U.S.C.A. Const.Amend. 5;West's RCWA Const. Art. 1, §
16; West's RCWA 35.22.288, 81.112.080(2).

[14] Eminent Domain 67
148k67 Most Cited Cases
When reasonable minds can differ, courts will not disturb the legislative body's decision that necessity for a condemnation exists so long as it was reached honestly, fairly, and upon due consideration of the facts and circumstances. U.S.C.A. Const.Amend. 5;

West's RCWA Const. Art. 1, § 16.

[15] Eminent Domain ⚿67
148k67 Most Cited Cases
Even if a legislative decision that a condemnation was necessary was partially motivated by improper considerations, it will not be vacated so long as the proposed condemnation demonstrates a genuine need and the condemnor in fact intends to use the property for the avowed purpose. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[16] Eminent Domain ⚿67
148k67 Most Cited Cases
In determining whether a legislative decision to condemn property was arbitrary and capricious, courts may consider numerous factors, such as the dollar contribution of the private party, the percentage of public versus private use, and whether the private use is occurring in an architectural surplus of usable space, but there is no definitive list of factors for court's consideration. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[17] Eminent Domain ⚿262(4)
148k262(4) Most Cited Cases
On review of trial court's ruling on whether legislative decision to condemn property was arbitrary and capricious, the Court of Appeals reviews the record to determine only whether the factual findings are supported by substantial evidence, since the trial judge has already weighed the evidence supporting public necessity. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[18] Eminent Domain ⚿56
148k56 Most Cited Cases
Historical nature of property, i.e., having house built along railroad right-of-way, did not render regional transit authority's finding of necessity to condemn property for light rail project arbitrary or capricious; preservation society attempted to interest authority in preserving house but turned to other projects when authority declined, and city and state preservation agencies did not attempt to preserve house. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[19] Eminent Domain ⚿68
148k68 Most Cited Cases
As long as condemning agency considered the environmental impacts of determining condemnation of certain property was necessary, it is not for the court to substitute its judgment in the absence of some demonstration of fraud or arbitrary and capricious conduct. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[20] Eminent Domain ⚿56
148k56 Most Cited Cases
A particular condemnation of property is necessary as long as it appropriately facilitates a public use; it need not be the best or only way to accomplish a public goal. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[21] Eminent Domain ⚿196
148k196 Most Cited Cases

[21] Evidence ⚿571(1)
157k571(1) Most Cited Cases
In light of judicial deference to legislative condemnation determinations, expert testimony from landscape architect, who believed another site was better suited for transit station, was not a basis for reversing regional transit authority's legislative decision that condemnation of certain property for light rail station was necessary. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.
****591** Charles A. Klinge, Diana M. Kirchheim, Groen Stephens & Klinge LLP, Bellevue, for Petitioner/Appellant.

Larry John Smith, Janis G White, Graham & Dunn PC, Seattle, David H. Prather, Pierce County Deputy Prosecutor, Civil Division, Tacoma, for Appellee/Respondent.

Timothy Ford, Olympia, for Amicus Curiae, Building Industry Assoc. of Washington.

FAIRHURST, J.

***406** ¶ 1 Kenneth R. Miller and Barbara I. Miller and Miller Building Enterprises, Inc., a construction company (hereinafter collectively Miller), own a

large parcel of land in Tacoma near a railroad line. Central Puget Sound Regional Transit Authority, commonly known as Sound Transit, seeks to condemn this property to build a park-and-ride for a commuter rail transit station. To do so, Sound Transit must establish, among other things, that the condemnation is necessary. Whether condemnation is necessary is a legislative judgment. Courts will overturn that legislative judgment only when the challenger can prove ***407** that it is the product of actual fraud, or is arbitrary and capricious enough to constitute constructive fraud, or when the government fails to abide by the clear dictates of the law.

¶ 2 After extensive research and solicitation of community opinion, several potential sites were identified. Sound Transit held a public hearing to determine which proposed site to use for the rail station. By law, potential condemnees are not entitled to actual individualized notice. Instead, Washington law requires that agencies develop procedures to give reasonable notice of these meetings to the public which may include informing the local media. Sound Transit has elected to implement this statutory discretion by posting meeting times and agendas on its website. It does not directly notify the media.

¶ 3 The primary issue for review is whether Sound Transit's method of notifying the public of its meetings is adequate. Alternately, Miller challenges the substantive decision that public necessity for the condemnation exists. We hold that Sound Transit complied with statutory requirements in notifying the public of its meetings and that Sound Transit's determination of necessity is not the product of actual or constructive fraud. We affirm the trial court.

I. FACTS

¶ 4 In 1992, in an effort to respond to the increasing traffic congestion in the Puget Sound region, the Washington Legislature authorized the state's largest counties to seek voter approval to create regional transportation entities to coordinate efforts to create and maintain a healthy transportation infrastructure. RCW 81.112.010. These transit authorities were given all powers necessary to implement and support a high capacity transportation system, including the power to condemn private property. RCW 81.112.070, .080(2). Four years later, voters in the Puget Sound region approved the creation and funding of Sound Transit. Among its other projects, Sound Transit is ***408** attempting to make commuter rail an alternative to commuters along the I-5 corridor.

¶ 5 Currently, commuter rail runs from downtown Tacoma to downtown Seattle. This case involves Sound Transit's efforts to extend the line south. In 1998, Sound Transit began to investigate possible sites for a new transit station in South Tacoma or Lakewood. In 1999, workshops and public meetings were held in Tacoma to determine the best way to proceed and the best potential sites for transit stations. By 2001, three different possible sites had been identified. One of the sites near South Tacoma Way and south 60th in Tacoma involved a large piece of property owned by Miller. The Miller property would be able to provide about 85 percent of the space needed for a park and ride. While the site is apparently contaminated with industrial waste, it appears that it can safely be used as a parking lot.

¶ 6 In the first three years of the site investigation, Miller cooperated with Sound Transit in the possible condemnation action. In 2001, Miller executed a release that allowed Sound Transit to enter the property to survey and take soil samples. Meanwhile, in June 2003, Sound Transit scheduled a public ****592** Board of Directors meeting to discuss which of three sites in the area was best suited for the transit center. Notice of this meeting and its agenda were published on the Sound Transit web site but it appears that no other steps were taken to inform the community of the upcoming meeting. A Sound Transit employee testified that it was considered "unseemly" to notify property owners individually that a state agency is considering condemning their property before a decision had been made. 1 Verbatim Report of Proceedings (VRP) (Oct. 25, 2004) at 31. Sound Transit's internal rules recite that:

Whenever feasible, the Board Administrator shall

furnish the Agenda for meetings of the Board and Committees to one or more local newspapers of general circulation in advance of such meetings.

***409** Ex. 14, at 12. According to Marcia Walker, the administrator to the Board of Sound Transit, "[t]he way that [Sound Transit] furnish[es] the agenda and materials to the public and media is by posting on the website." 1 VRP at 101. Walker testified that this method had been used to provide notice ever since Sound Transit had a web site. The trial court specifically found that the method satisfied both statutory requirements and Sound Transit's internal rules.

¶ 7 At the public Board of Directors' meeting, the plan that included the Miller property (along with others) was selected. The record indicates this was motivated in part by the fact that no overpass would have to be built over the railroad tracks and all parking could be consolidated in one lot, which would be simpler to control and secure. Sound Transit then instituted condemnation proceedings against all of the selected properties. On July 10, 2003, Miller was served with a formal notice of intent to acquire property. In August 2004, Miller was served with the petition in eminent domain. The public use and necessity hearing was held on October 25 and November 1, 2005, in Pierce County Superior Court.

¶ 8 At the public use and necessity hearing, Miller resisted the condemnation and challenged the Board of Directors' determination that the condemnation of their property was necessary. Miller argued that the agency had improperly rejected other sites on the erroneous belief that they were environmentally contaminated and had overlooked the value of a building on their property which has the apparent distinction of being the first house built along a railroad right-of-way in Tacoma. The trial court concluded that Sound Transit had given proper notice, had established public use and necessity, and that the condemnation action could proceed to the just compensation stage. The trial court explicitly rejected Miller's claim that the action ***410** was arbitrary and capricious or the product of fraud. Miller sought direct review, which we granted. [FN1]

FN1. It appears that the property valuation stage of the condemnation proceeding has been stayed awaiting this court's decision on whether Sound Transit has established public necessity for the condemnation.

II. ISSUES

A. Did Sound Transit adequately notify the community of the meeting agenda where the necessity for condemning the property would be discussed?

B. Did Miller establish that Sound Transit committed actual or constructive fraud in determining that there was public necessity for condemning the Miller property?

III. ANALYSIS

[1][2][3] ¶ 9 We first briefly review the underlying law. The power of eminent domain is an inherent attribute of sovereignty. *Boom Co. v. Patterson,* 98 U.S. (8 Otto) 403, 406, 25 L.Ed. 206 (1878); *see also State v. King County,* 74 Wash.2d 673, 675, 446 P.2d 193 (1968) (citing *Miller v. City of Tacoma,* 61 Wash.2d 374, 378 P.2d 464 (1963)). That power is limited by the constitution and must be exercised under lawful procedures. *Miller,* 61 Wash.2d at 382-83, 378 P.2d 464; *King County,* 74 Wash.2d at 675, 446 P.2d 193. Once a state agency with the power of eminent domain has made the initial determination that condemnation is necessary, the matter moves into court for a three-stage proceeding. First, there must be a decree of public use and necessity. Second, just compensation ****593** must be determined. Finally, just compensation must be paid and title transferred. *See generally* 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE, REAL ESTATE: PROPERTY LAW (2d ed.2004) § 9.28, at 635 (hereinafter STOEBUCK & WEAVER); *City of Des Moines v. Hemenway,* 73 Wash.2d 130, 138, 437 P.2d 171 (1968); *see also* WASH. CONST. art. I, § 16. We are only at the first stage of this proceeding ***411** and Miller conceded at the hearing below that this property is being condemned for a public use. [FN2] Miller challenges whether condemnation is necessary.

FN2. Nor would such a challenge to public use likely prevail. The dissent spends several pages arguing that the determination of public "use" is a judicial inquiry requiring no deference to the agency seeking condemnation. Dissent, J.M. Johnson, J., at 602-603. Not only do we disagree with the dissent's characterization of the court's role on this question, we note that it is not at issue here. First, while the determination of public use is for the courts, this court has explicitly stated that it will show great deference to legislative determinations. *Hemenway,* 73 Wash.2d at 139, 437 P.2d 171. Moreover, the condemnation of private property for public transportation is within the state's eminent domain power and almost categorically a public use. *State ex rel. Devonshire v. Superior Court for King County,* 70 Wash.2d 630, 636-37, 424 P.2d 913 (1967) (condemnation of private property for 1962 Exposition Monorail a public use (citing *State ex rel. McIntosh v. Superior Court for Pacific County,* 56 Wash. 214, 105 P. 637 (1909))). We also note that the dissent continues to conflate the terms "use" and "necessity" as it did in ***In re Petition of Seattle Popular Monorail Authority,* 155 Wash.2d 612, 635 n. 18, 121 P.3d 1166 (2005)**. Dissent, J.M. Johnson, J., at 605-606. In the section entitled "Unsubstantiated Public Use Determination," the dissent uses the terms "use" and "necessity" interchangeably throughout the section, claiming that both are judicial determinations. ***Id.*** Second, although Miller originally challenged whether the project was for a public use, the trial court made a specific finding that Miller did not contest the determination of public use at trial and Miller did not assign error to the court's finding on appeal. Clerk's Papers (CP) at 251 (finding of fact no. 27).

[4][5][6] ¶ 10 Whether condemnation is necessary is largely a question for the legislative body of the jurisdiction or government agency seeking condemnation. *Hemenway,* 73 Wash.2d at 139, 437 P.2d 171. A legislative body's declaration of necessity "is conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud." *Id.* at 139, 437 P.2d 171 (citing *City of Tacoma v. Welcker,* 65 Wash.2d 677, 399 P.2d 330 (1965)). In the condemnation context, necessary means "reasonable necessity under the circumstances. *State ex rel. Lange v. Superior Court,* 61 Wash.2d 153, 377 P.2d 425 (1963). It does not mean immediate, absolute, or indispensable need." *Id.* at 140, 437 P.2d 171.

[7] ¶ 11 Typically, challenges to necessity are raised when arguably excess land is seized or when condemnation is for a disguised private use. *See, e.g., State ex rel. Wash. State Convention & Trade Ctr. v. Evans,* 136 Wash.2d 811, 966 P.2d 1252 (1998) (holding condemnation of property needed for convention center expansion lawful even though an incidental private use would ensue). Out of respect for our ***412** coordinate branches of government, judicial review is deferential. *E.g., id.,* at 823, 966 P.2d 1252. Additionally,

> [w]hen it comes to such discretionary details as the particular land chosen, the amount of land needed, or the kinds of legal interests in that land that are necessary for the project, many Washington decisions have said that the condemnor's judgment on these matters will be overturned only if there is "proof of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud."

STOEBUCK & WEAVER, at 636 (quoting *State v. Brannan,* 85 Wash.2d 64, 68, 530 P.2d 322 (1975). "Seldom has this court found that a condemning authority has abused its trust in making a declaration of public necessity. This should not be surprising, for it is not to be presumed that such abuses often occur." *Brannan,* 85 Wash.2d at 68, 530 P.2d 322.

[8] ¶ 12 Washington courts have held that personal notice of the public meeting establishing necessity is not required either by the statute or due

process. *Port of Edmonds v. NW. Fur Breeders Coop., Inc.,* 63 Wash.App. 159, 168, 816 P.2d 1268 (1991). Personal notice is required, however, to begin ****594** the three-step condemnation proceeding. *Id.* ("[P]ersonal notice (and hearing) are required before a final taking of a property can occur."). Miller does not contend that they did not receive personal notice of the condemnation proceeding.

A. Notice Adequacy

[9] ¶ 13 Miller challenges the notice Sound Transit provided for the public hearing at which the site selection was made. Miller asserts that the notice was inadequate and, therefore, argues that this court should vacate the legislative declaration that condemnation is necessary.

1. General requirements

[10][11] ¶ 14 Procedural errors, such as lack of proper notice, are questions of law reviewed de novo. *State v. Harris,* 114 Wash.2d 419, 441, 789 P.2d 60 (1990). As the challenger, Miller bears the burden of proof that the notice ***413** was defective. The trial judge found that the notice met the statutory and internal requirements and rejected the claim below. Clerk's Papers (CP) at 252 ("There were no deficiencies in notice, and Sound Transit did hear from the appropriate participants when indicated.").

¶ 15 Importantly, Miller never convincingly argues that *they* had no notice of this hearing. Nor does Miller raise a facial due process challenge. There is considerable evidence that Miller was involved in the site selection process for many years. Instead, Miller is essentially raising a general claim that the public had insufficient notice.

¶ 16 Sound Transit is obligated to give notice of public meetings where eminent domain will be discussed. RCW 81.112.080(2) (directing regional transportation entities to use the same methodology as first class cities for such procedures); RCW 35.22.288 (setting forth procedures). Specifically:

> [E]very city *shall* establish a procedure for notifying the public of upcoming hearings and the preliminary agenda for the forthcoming council meeting. Such procedure may include, but not be limited to, written notification to the city's official newspaper, publication of a notice in the official newspaper, posting of upcoming council meeting agendas, *or such other processes as the city determines will satisfy the intent of this requirement.*

RCW 35.22.288 (emphasis added). Sound Transit determined that posting meeting agendas on its own web site satisfied the intent of the statute and furnished appropriate notice to the community. [FN3]

> FN3. The dissent takes us to task for ignoring the notice requirements of Sound Transit's internal procedures in our analysis. Dissent, J.M. Johnson, J., at 603. However, the dissent does not cite any authority to support a claim that the internal procedures govern our analysis. We look to the statutory requirements to determine the adequacy of notice for condemnation. Regardless, the trial court found that Sound Transit complied with its own internal rule regarding notice of public meetings. The court determined that Sound Transit's method of posting notice on its web site was sufficient to furnish notice to the local newspapers. VRP (Nov. 19, 2004) at 12 ("There was nothing that I heard other than the custom for years that this was generally accepted in the community and, for all I knew, generally accepted by the newspapers as well.... I think that the ultimate conclusion is that it was an appropriate method of service to the newspapers."). Even if we were to analyze the notice provided by Sound Transit under its internal procedures, we would still find the notice to be sufficient. Sound Transit's internal procedures merely require the agenda to be furnished to one or more local newspapers of general circulation *whenever feasible.* Ex. 14 at 12 (emphasis added).

***414**[12] "¶ 17 The purpose of notice statutes is to apprise fairly and sufficiently those who may be affected of the nature and character of an action so they may intelligently prepare for the hearing." *Nisqually Delta Ass'n v. City of DuPont,* 103 Wash.2d 720, 727, 696 P.2d 1222 (1985). Courts have vacated a legislative decision that condemnation is necessary for violation of notice statutes. *See NW. Fur Breeders,* 63 Wash.App. at 169, 816 P.2d 1268.

¶ 18 In *Northwest Fur Breeders,* the local port authority sought to condemn property near a harbor. *NW. Fur Breeders,* 63 Wash.App. at 161, 816 P.2d 1268. Port districts, like regional transportation districts, are directed by statute to use the same eminent domain procedures as first class cities. *Id.* at 163, 816 P.2d 1268. Notice of the public hearing where the condemnation was discussed ****595** was given to local newspapers but the notice did not include notice of the preliminary agenda of the meeting as required by statute. *Id.* Thus readers had no reason to expect that any condemnation would be discussed. *Id.* at 162, 816 P.2d 1268. The subsequent condemnation was challenged on the basis of faulty notice. *Id.* at 163, 816 P.2d 1268. The court agreed that the notice was substantially faulty and vacated the decree of public necessity. *Id.* at 169, 816 P.2d 1268.

¶ 19 In *Northwest Fur Breeders,* the primary question for review was whether the statute requiring notice of the preliminary agenda for the legislative body applied to port districts. *Id.* at 164, 816 P.2d 1268. Once the decision was made that the statute applied, it was clear that the statute had been violated. *See* RCW 35.22.288 ("[E]very city shall establish a procedure for notifying the public of ... *the preliminary agenda* for the forthcoming council meeting." (emphasis added)). *Northwest Fur Breeders* provides us little help in deciding whether notice of a public meeting published on a ***415** web page is an appropriate exercise of the discretion vested by statute. The Court of Appeals specifically noted that

> We do not hold that notice of the preliminary agenda for meetings at which condemnation will be considered must necessarily be published in a newspaper. Rather RCW 35.22.288 requires the Port to establish a procedure for notifying the public of the preliminary agenda. There may be effective methods of providing the required notice other than publication.

NW. Fur Breeders, 63 Wash.App. at 167 n. 5, 816 P.2d 1268. Here, the preliminary agenda was published; the question was whether Sound Transit correctly exercised the discretion vested in it by statute. Accordingly, we turn now to whether posting notice and a meeting agenda on the public agency's web site can satisfy the statute.

2. Web posting

¶ 20 There is very little case law on the subject of the sufficiency of web posting for notice requirements. Courts in several cases have rejected web posting as a method to apprise class members of a class action suit. *See, e.g., Reab v. Elec. Arts, Inc.,* 214 F.R.D. 623, 631 (D.Colo.2002). However, in such instances the posting was not an exercise of *legislative* authority. Additionally, the California Court of Appeals held last year that statements on a web site "hardly could be more public." *Wilbanks v. Wolk,* 121 Cal.App.4th 883, 885, 17 Cal.Rptr.3d 497, 503 (2004); *see also Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) ("[The Web] provides relatively unlimited, low-cost capacity for communications of all kinds.").

¶ 21 Miller's argument that posting on a web site does not necessarily "furnish" notice to anyone is unfounded. Just as it is impossible to assure that anyone will look at a particular web site, it is equally impossible to assure that anyone will purchase, much less read, a newspaper. In addition, there is no way to assure that a newspaper will even publish a notice furnished by an agency because agencies are not required to buy advertising space. ***416** More important, however, is the fact that RCW 35.22.288 does not require an agency to use one of the listed methods, much less prohibit the use of the internet. The statute explicitly states that the methods "may include, but not be limited to" those specifically listed. RCW 35.22.288. Clearly, *any other method* that provides comparable notice to

those listed would meet the statutory requirement. Miller has not shown that publication on the Sound Transit web site failed in any way to meet the standard set forth in the statute. While precedent on this subject is sparse, posting on a public web site is at least as likely to provide the community with notice as the specifically approved notice given to a newspaper, and this was the method Sound Transit had used for years.

3. Specificity

[13] ¶ 22 Miller also claims that the agenda posted by Sound Transit on its web site was not specific enough to put property owners on notice. We disagree.

¶ 23 The agenda stated in part that the Board of Directors would consider:

> Resolution No. R2003-13--Authorizing the Executive Director to acquire, dispose, or ****596** lease certain real property interests by negotiated purchase, by condemnation, (including settlement) condemnation litigation ... to affected owners and tenants as necessary for the construction of the Lakewood and South Tacoma Commuter Rail Station, the new Lakewood Connector railroad line to be constructed from D Street to M Street in Tacoma ... and to execute all documents necessary to convey certain of those interests to the City of Tacoma[.]

Ex. 12. The agenda was sufficient to put the public on notice that a condemnation in the area would be considered. The statute requires only that the notice be descriptive enough for a reasonable person to be fairly apprised of what was to be discussed at the meeting and notice is generally deemed adequate absent a showing that it was misleading. *Dep't of Natural Res. v. Marr,* 54 Wash.App. 589, 596, 774 P.2d 1260 (1989) (citing *Nisqually Delta Ass'n v. City of DuPont,* 103 Wash.2d 720, 727, 696 P.2d 1222 (1985).) ***417** Miller cannot plausibly argue that a notice stating the intent to purchase property by condemnation would not have fairly apprised them of the meeting's purpose. Sound Transit provided all the notice that the statute requires and Miller does not argue that due process requires more.

¶ 24 We affirm the trial court and hold that Sound Transit's method of notifying the public meets the statutory standard.

B. Substantive Decision

¶ 25 Additionally, Miller challenges the substantive decision that the condemnation was necessary. [FN4] The trial court found that Miller had not substantiated any of their challenges by a preponderance of the evidence.

> FN4. As noted above, we do not review the question of whether the condemnation was for a public use because Miller conceded the point at trial. Our analysis addresses only the question of whether it was necessary to condemn this particular property.

[14][15] ¶ 26 As stated previously, whether the condemnation is *necessary* is a legislative question. *Hemenway,* 73 Wash.2d at 139, 437 P.2d 171; *State ex rel. Hunter v. Superior Court for Snohomish County,* 34 Wash.2d 214, 218, 208 P.2d 866 (1949). A legislative body's determination of necessity is conclusive unless there is proof of actual fraud or arbitrary and capricious conduct amounting to constructive fraud or the government fails to abide by the clear dictates of the law. [FN5] *Hemenway,* 73 Wash.2d at 139, 437 P.2d 171. When reasonable minds can ***418** differ, courts will not disturb the legislative body's decision that necessity exists so long as it was reached "honestly, fairly, and upon due consideration" of the facts and circumstances. *Welcker,* 65 Wash.2d at 684, 399 P.2d 330. The decision may be unwise, but it is still a decision for the legislative body to ****597** make, not this court. *Miller,* 61 Wash.2d at 391, 378 P.2d 464. Even if the decision was partially motivated by improper considerations, it will not be vacated so long as "the proposed condemnation demonstrates a genuine need and ... the condemnor in fact intends to use the property for the avowed purpose." *In re Petition of Port of Grays Harbor,* 30 Wash.App. 855, 864, 638 P.2d 633 (1982) (citing *State v. Hutch,* 30 Wash.App. 28, 631 P.2d 1014 (1981)).

FN5. The dissent makes several claims regarding the trial court's review of the evidence, all of which misconstrue our case law regarding the court's role in assessing necessity. First, the dissent claims that the resolution and petition did not contain "particularized facts" about public necessity. Dissent, J.M. Johnson, J., at 605. However, at no point do either RCW 35.22.288 or RCW 8.12.060 require the resolution or petition to contain the level of detail suggested by the dissent.
Second, the dissent argues that the trial court did not require Sound Transit to make a show of substantial evidence to support its public necessity determination. *Id.* We reiterate that the necessity determination is deemed *conclusive* absent a showing by the property owner of actual fraud or arbitrary and capricious conduct amounting to constructive fraud; something Miller did not show. ***Seattle Popular Monorail,* 155 Wash.2d at 629, 121 P.3d 1166;** *Hemenway,* 73 Wash.2d at 139, 437 P.2d 171. However, even if this were not so, Sound Transit provided extensive evidence of the reasons for its determination. The Millers simply do not agree with those reasons. The fact that another choice could have been made does not tip the balance to the property owner in a review of necessity.
Third, the dissent claims that Sound Transit failed to provide rebuttal evidence to counter evidence presented by Miller. Dissent, J.M. Johnson, J., at 607. Again, based on the test we have outlined above, an agency is not required to rebut a property owner's evidence where the parties merely disagree on the chosen site. It the property owner has not shown actual fraud or arbitrary and capricious conduct by the agency, a court will generally let the agency's choice stand. *Welcker* 65 Wash.2d at 684-85, 399 P.2d 330. Even if such evidence were required, however, the record indicates that Sound Transit presented voluminous evidence supporting its site choice; the trial court was not obliged to require more.

[16]. ¶ 27 Miller suggests that this court created a nine-part test in *Deaconess Hospital v. Washington State Highway Commission,* 66 Wash.2d 378, 403 P.2d 54 (1965), to determine whether the decision to condemn property was arbitrary and capricious. [FN6] But in 1998, 33 years after *Deaconess,* this court specifically noted that "[we have] not ***419** previously enumerated factors to consider when determining whether a public use is truly necessary." *Evans,* 136 Wash.2d at 823, 966 P.2d 1252. "[S]ome relevant considerations," however, "are the dollar contribution of the private party, the percentage of public versus private use, and whether the private use is occurring in an architectural surplus of usable space." *Id.*

FN6. Miller refers to the following passage for support:
By what tests should the court gauge administrative decisions? Here are the principal standards: Did the agency proceed in accordance with and pursuant to constitutional and statutory powers? Were the agency's motives honest and intended to benefit the public? Were they honestly arrived at-- that is, free from influence of fraud and deceit? Were they free of any purpose to oppress or injure--even though injury and damage to some may be inherent in accomplishing the particular public benefit? Did the administrative agency give notice, where notice is due, and hear evidence where hearings are indicated? Did the agency make its decision on facts and evidence? Were its actions in the last analysis rational, that is, based upon a reasonable choice supported by facts and evidence? If the answers to all of these queries are in the affirmative, then the decision of an administrator, unless placed under complete judicial review by law, cannot be held arbitrary, capricious, unreasonable or oppressive by the courts. That the courts may have reached a decision, made a

> choice or a conclusion different from that of the administrative agency, or taken wiser or more sensible action, does not empower them to do so.
> *Deaconess,* 66 Wash.2d at 405-06, 403 P.2d 54.

¶ 28 *Deaconess* provided some different considerations but made clear that as long as the "administrative agency has acted honestly, with due deliberation, within the scope of and to carry out its statutory and constitutional functions, and been neither arbitrary, nor capricious, nor unreasonable, there is nothing left for the courts to review." *Deaconess,* 66 Wash.2d at 406, 403 P.2d 54. Again, this is rooted in our respect for the other branches of government. "A different conclusion would place the judiciary in the untenable position of substituting its judgment for that of the administrative agency contrary to a number of decisions." *Id.* This court has declined to create a definitive laundry list of considerations and this case provides no reason to depart from our tradition and precedent.

[17] ¶ 29 Instead, since the trial judge has already weighed the evidence supporting public necessity, this court will review the record to determine only whether the factual findings are supported by substantial evidence. Substantial evidence is viewed in the light most favorable to the respondent, and is evidence that would "persuade a fair-minded, rational person of the truth of the finding." *State v. Hill,* 123 Wash.2d 641, 644, 870 P.2d 313 (1994).

¶ 30 We turn now to the specific challenges.

1. Historical nature of the property

[18] ¶ 31 Miller argues that Sound Transit did not properly consider the historical nature of the property and, accordingly, its decision was arbitrary and capricious. At some ***420** point after March 2002, Miller learned that a house on the property had possible historical significance and that at least one other buyer was interested in the property. That buyer, however, was not interested in acquiring the property if it was going to be condemned. It appears that a house on the property was "built along the right-of-way by the railroad workers in the evening hours after work. They are referred to as twilight workers." 2 VRP (Nov. 1, 2004) at 121. The ****598** Railcar Preservation Society attempted to interest Sound Transit in preserving the home as part of the transit center but, ultimately, Sound Transit declined to do so and the society turned to other projects.

¶ 32 The historical value of the property is questionable. After consideration, the Tacoma historic preservation office declined to nominate the house as a historic landmark. Similarly, the State Office of Archeology and Historic Preservation found the transit project had no adverse historical impacts. While it appears Sound Transit was not initially aware of the historical significance of the house when it was originally considering various sites, it was well aware of it by the time it had decided to condemn the property.

¶ 33 This court has already held that it is not arbitrary and capricious to select a site with a "substantial dwelling house" on the property, even when vacant tracts are nearby. *Hunter,* 34 Wash.2d at 219, 208 P.2d 866. In this case, the evidence of the historic property was considered by Sound Transit before it decided condemnation was necessary. This was affirmed by the trial court. Miller has not established arbitrary and capricious conduct upon these facts.

2. Problems with the other sites

¶ 34 Miller asserts that Sound Transit was mistaken about the potential environmental problems with the various sites. [FN7] At some point during the process, Sound Transit ***421** appears to have erroneously believed that the alternative sites were contaminated but that the Miller property was not. In fact, it appears that all the Tacoma sites were contaminated to some degree.

> FN7. The dissent also asserts that Sound Transit made false representations about environmental problems related to the

> properties under consideration. Dissent, J.M. Johnson, J., at 607. It appears, though, that all of the properties had some environmental problems and Sound Transit simply failed to comment about the environmental issues on the Miller property. CP at 249 (finding of fact no. 19). The dissent claims that Sound Transit relied on "clearly erroneous factual findings" in making its determination and that this constituted arbitrary and capricious conduct. Dissent, J.M. Johnson, J., at 607. We disagree. It is far from clear to what extent Sound Transit *relied* on this information in making its determination. In addition, the trial court correctly considered the possibility that this and other facts might have affected the outcome and ultimately concluded that Sound Transit's determination was not unreasonable. CP at 252 (conclusion of law no. 12).

[19] ¶ 35 However, it is not the role of the court to take a second look at the various environmental considerations at issue. As long as Sound Transit considered the environmental impacts, it is not for the court to substitute its judgment in the absence of some demonstration of fraud or arbitrary and capricious conduct. *See Brannan,* 85 Wash.2d at 74-77, 530 P.2d 322. We note in passing that questions of public use and necessity are not subject to the State Environmental Policy Act, chapter 43.21C RCW. *See generally Marino Prop. Co. v. Port of Seattle,* 88 Wash.2d 822, 830-31, 567 P.2d 1125 (1977).

3. Better alternate locations

[20] ¶ 36 Miller contends that a nearby site would be better suited for the project and that condemnation is not necessary. But a particular condemnation is necessary as long as it appropriately facilitates a public use. *Hemenway,* 73 Wash.2d at 138, 437 P.2d 171. Put another way, when there is a reasonable connection between the public use and the actual property, this element is satisfied. It need not be the best or only way to accomplish a public goal. This court has explicitly held already that the "mere showing" that another location is just as reasonable does not make the selection arbitrary and capricious. *Hunter,* 34 Wash.2d at 219, 208 P.2d 866.

[21] ¶ 37 This broad approach is rooted not only in our deference to other branches of government, but also to the institutional competence of courts. We have already ruled that site selection is essentially a legislative question not a ***422** judicial one. Courts give especial deference to agency site selection decisions because courts "are not trained or equipped to pick the better route, much less design and engineer the project." *Deaconess Hospital,* 66 Wash.2d at 405, 403 P.2d 54; *accord* ****599Brannan,*** 85 Wash.2d at 69, 530 P.2d 322. Expert testimony from landscape architect Stephen Speidel, who believed another site was better suited for the transit station, is not a basis for reversing the legislative decision that condemnation was necessary.

4. Intimidation

¶ 38 Finally, Miller claims that one of the witnesses, William Eugene "Skip" Vaughn, was threatened by the chair of the Sound Transit Board. While this was raised to the trial court, no finding of fact or conclusion of law directly addresses it. The trial court impliedly found it uncompelling by finding that Sound Transit did not act in an arbitrary and capricious fashion.

¶ 39 Vaughn is chair of the South Tacoma Neighborhood Council. He had been involved in the siting of the South Tacoma rail station since at least 1998, and had attended at least three public meetings concerning it. After the site selection was made, Vaughn requested reconsideration. He preferred a different site. He testified that he met with Pierce County Executive John Ladenburg and Kevin Phelps, the city of Tacoma representative on the Sound Transit Board. Vaughn testified that "[t]hey indicated the decision had been made and would not discuss the reasons for it but indicated that if we made waves, we'd probably lose the station altogether." 2 VRP (Nov. 1, 2004) at 116.

He also testified that he took their comments "[k]ind of as a threat to be quiet." *Id.* at 117, 530 P.2d 322.

¶ 40 We are unconvinced that Ladenburg's and Phelps' statements were threats. [FN8] At worst, Ladenburg and Phelps ***423** appeared to believe that without community support, there would be no transit station. There is no evidence on the record that Ladenburg or Phelps intended that the presence or absence of a transit station to adversely affect Vaughn. [FN9]

> FN8. *Black's Law Dictionary* defines "threat" as "[a] communicated intent to inflict harm or loss on another or on another's property, esp [ecially] one that might diminish a person's freedom to act voluntarily or with lawful consent." BLACK'S LAW DICTIONARY 1519 (8th ed.2004).
>
> FN9. Additionally, Miller alleges that a neighbor was told he could not get building permits while his property was being considered for condemnation. This does not appear to be relevant.

¶ 41 We find each of Miller's specific challenges to be without merit. Moreover, even if we agreed with one or more of Miller's contentions, we still might not disturb Sound Transit's finding of necessity because of the high level of deference we accord legislative bodies in making necessity determinations. *Hunter,* 34 Wash.2d at 218, 208 P.2d 866; *Port of Grays Harbor,* 30 Wash.App. at 864, 638 P.2d 633 (holding necessity determination will not be vacated as long as "the proposed condemnation demonstrates a genuine need and ... the condemnor in fact intends to use the property for the avowed purpose" (citing *Hutch,* 30 Wash.App. 28, 631 P.2d 1014)).

IV. CONCLUSION

¶ 42 We hold that Sound Transit properly exercised the discretion vested in it by law when it published its meeting agenda on its web site and that Miller has not shown that the public necessity determination was the product of arbitrary and capricious conduct or actual fraud. Accordingly, we affirm the trial court on all counts. [FN10]

> FN10. Sound Transit also moves for sanctions for filing a frivolous appeal. RAP 18.9(a). We deny this motion, as there was a tenable issue of whether web posting is sufficient to meet notice requirements. Miller also moves for attorney fees under RCW 8.25.075. Given our disposition, we deny Miller's motion.

C.JOHNSON, MADSEN, BRIDGE and OWENS, JJ., concur.

ALEXANDER, C.J. (dissenting).

¶ 43 The purpose of notice statutes is to fairly and sufficiently inform those who may be affected by government action of the nature and character of a proposed action so they may intelligently prepare for the public hearing on the action. ***424***Nisqually Delta Ass'n v. City of DuPont,* 103 Wash.2d 720, 727, 696 P.2d 1222 (1985). In this case, Kenneth and Barbara Miller and their construction company, Miller Enterprises, Inc., ****600** knew for years that they might be affected by Central Puget Sound Regional Transit Authority's (Sound Transit) rail project in Tacoma. In July 2001, the Millers even allowed the transit agency to survey and take soil samples from some of their land that was potentially on the project's path. That does not mean, however, that the Millers were "fairly and sufficiently" apprised that on June 26, 2003, the Sound Transit board would consider a resolution authorizing condemnation of their land. Because I believe that Sound Transit did not adequately inform affected parties before authorizing condemnation in this case, I dissent.

¶ 44 Prior notice that the condemnation resolution at issue would be considered was limited to a single item on the June 26, 2003, meeting agenda, posted only on the agency's website. That single agenda item referred to acquiring "certain real property interests" by negotiated purchase or condemnation,

"as necessary for the construction of the Lakewood and South Tacoma Commuter Rail Stations." Ex. 12. And while the Miller property was described in Exhibit A to the proposed resolution, no specific locations were mentioned on the agenda posted electronically for public notice purposes. To say "Lakewood and South Tacoma" hardly narrows the possibilities. Therefore, at best, the meeting notice merely alerted the Internet-attentive people within the affected area to seek more details elsewhere. At worst, it utterly failed to apprise anyone lacking Internet access of the existence of the resolution.

¶ 45 "[A] proper hearing can be no greater protection for the public and the individual landowner than the opportunity afforded by the notice to take an *informed part* therein." *Glaspey & Sons, Inc. v. Conrad,* 83 Wash.2d 707, 713, 521 P.2d 1173 (1974). When interested parties are ill-informed of government proposals, "the public at large will be deprived of an 'informed' resolution of problems that ***425** are the subject of the hearing." *Id.* at 713, 521 P.2d 1173. Here, Sound Transit does not point to any evidence in the record indicating that the Millers, or any other parties interested in the condemnation plan, were known to have access to the Internet. Yet the agency says it routinely relied solely on Internet postings to announce meeting agendas. [FN1] In doing so, it risked excluding a segment of the population from contributing to "an informed resolution" of station siting.

> FN1. I take little comfort in the agency's suggestion that a newspaper reporter might peruse the agency's website and independently inform the non-Internet-using public of meeting plans. Such a passive approach is inconsistent with the RCW 35.22.288 requirement for "notifying the public."

¶ 46 While I agree with the majority that the relevant statute, RCW 35.22.288, does not necessarily require notice to be published in a newspaper, I disagree that the Internet-only notice in this case met the intent of the statute. It is highly optimistic to expect a landowner's clicks of the computer mouse to lead, at the right time and on the right site, to a posted proposal bearing on his property interests. It may be true that relying on random turns of a newspaper's pages is just as unlikely to inform an affected citizen of a pending action. But the statute explicitly authorizes agencies to notify the public through newspapers, whereas the Internet is not mentioned. Furthermore, in my view newspapers are more accessible to a wider range of people due to their cost--one of the few things in life still available for pocket change. Accordingly, I am troubled that, despite the apparent absence of any prior e-mail correspondence with the Millers indicating they were "wired," so to speak, Sound Transit simply presumed they would receive notice posted exclusively on the Internet. I do not believe government should rest so easily in the assumption that this more expensive medium is universal. Due process demands that government err on the side of giving abundant notice when it seeks to take property. Therefore, I respectfully dissent.

CHAMBERS, J., concurs.

***426** J.M. JOHNSON, J. (dissenting).

¶ 47 Appellants Kenneth and Barbara Miller had their property condemned by the Central Puget Sound Regulatory Transit Authority (Sound Transit) contrary to requirements ****601** of public notice and without Sound Transit proving the public necessity of the condemnation. Sound Transit contented itself by solely posting the meeting agenda on its website rather than notifying the owner and public through publication in a local newspaper or through posting on the property or in other public places, as the statute envisions. The internet posting did not even specify which lots were considered for condemnation, but instead gave a general location of the property.

¶ 48 Sound Transit voted to condemn the Millers' property, but never made a showing that condemnation of Millers' property was a public necessity--either at the board meeting or at the hearing before the trial court. At every step of the condemnation process, Sound Transit asserted that

agency determinations of public necessity are conclusive.

¶ 49 Washington Constitution article I, section 16 includes the *express declaration* that the question of a public use supporting a taking of private property by the government is a *judicial question* "without regard to any legislative assertion." This requirement is ignored (or explained away) by the majority, which instead suggests that "public use" is a legislative question entitled to deference. The majority's standard of review for public use contradicts the express constitutional mandate of article I, section 16.

¶ 50 Here, this error has the effect of allowing an agency to take a citizen's private property without adherence to proper notice procedures and to condemn without proper public consideration. The constitutionally limited eminent domain power is improperly expanded by the majority at the expense of the peoples' individual rights to own and use property and the public right to notice of governmental (proposed) action. I therefore dissent.

***427** I. SCOPE OF CONDEMNATION AUTHORITY

¶ 51 The right to own and use private property is an inherent right of the people, strongly protected in the constitution of this state. So serious is the Washington Constitution's respect for the right to private property that it expressly provides for strictly limited exercise of eminent domain power by the legislature, closely examined by the judiciary in order to protect private property from governmental infringement:

> No private property shall be taken or damaged for public or private use without just compensation having been first made .... Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public ....

WASH. CONST. art. I, § 16.

¶ 52 The placement of this provision in article I, Declaration of Rights, further underscores the primacy of the right of the people to own private property. That placement, and the language quoted above, indicates an eminent domain power that is strictly limited in rightful application. [FN1]

> FN1. *See Healy Lumber Co. v. Morris,* 33 Wash. 490, 505, 74 P. 681 (1903):
> It was no doubt for the purpose of preventing enthusiastic legislation, practically destroying this limitation [on the exercise of eminent domain], that the question of public use was especially submitted to the courts, who are, and should be, ever watchful in maintaining inviolate the constitutional rights of the citizen.
> *See also* James M. Dolliver, *Condemnation, Credit and Corporations in Washington: 100 Years of Judicial Decisions--Have the Framers' Views Been Followed?,* 12 U. Puget Sound L.Rev. 163, 175-76 (1989) ("The judicial determination clause in the Washington Constitution is a clause currently existing in only four other states [Arizona, Colorado, Mississippi and Missouri]"). "[T]he clear language of the provision, with its difference from most other constitutions and early cases, shows that the constitutional framers sought to place a limit on the legislature by assigning the judiciary to determine the character of proposed public uses." *Id.* (Footnotes omitted.)

¶ 53 Because of the inherent right of the people to own property, and the limited power of eminent domain, such ***428** power must be delegated by the legislature. Municipal corporations do not have an inherent power of eminent domain. Agencies may exercise such power only when expressly authorized to do so by the state legislature and in strict ****602** accord with such delegation. *See, e.g., State ex rel. Tacoma Sch. Dist. v. Stojack,* 53 Wash.2d 55, 60, 330 P.2d 567 (1958); *Teply v. Sumerlin,* 46 Wash.2d 504, 507, 282 P.2d 827 (1955).

¶ 54 Statutes conferring condemnation power are in derogation of the people's right, *State ex rel. King County v. Superior Court for King County,* 33 Wash.2d 76, 82, 204 P.2d 514 (1949), and must be strictly construed, both as to the extent of the power and as to the manner of its exercise. *See, e.g., Stojack,* 53 Wash.2d at 60, 330 P.2d 567; *State ex rel. Postal Tel.-Cable Co. v. Superior Court for Grant County,* 64 Wash. 189, 193, 116 P. 855 (1911). [FN2]

> FN2. All delegations of state authority are to be construed strictly, and this is " 'especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other.' " *State ex. rel. Chesterley v. Superior Court for Yakima County,* 19 Wash.2d 791, 800, 144 P.2d 916 (1944) (internal cite omitted).

¶ 55 To determine whether a use of the eminent domain power is permissible under our constitution, we employ a three-part test to judicially ascertain "(1) that the use is really public, (2) that the public interests require it, and (3) that the property appropriated is necessary for the purpose." *In re City of Seattle* (*Westlake*), 96 Wash.2d 616, 625, 638 P.2d 549 (1981) (citing *King County v. Theilman,* 59 Wash.2d 586, 593, 369 P.2d 503 (1962)). *See also State ex rel. Wash. State Convention & Trade Ctr. v. Evans,* 136 Wash.2d 811, 817, 966 P.2d 1252 (1998).

¶ 56 Because constitutional rights of a property owner are implicated, the burden of proof is *on the condemning agency* to demonstrate that the condemnation is for a public use and that (all) the taking is necessary for that public use. *Convention Ctr.,* 136 Wash.2d at 822-23, 966 P.2d 1252; ***429** *Theilman,* 59 Wash.2d 586, 369 P.2d 503; *State ex rel. Sternoff v. Superior Court for King County,* 52 Wash.2d 282, 325 P.2d 300 (1958). [FN3]

> FN3. The constitutional nature of the right of citizens to private property contradicts the majority's assertion that "[a]s the challenger, Miller bears the burden of proof that the notice was defective." Majority at 594.

¶ 57 Article I, section 16 of our state constitution requires a judicial "public use" inquiry. *See State ex rel. Puget Sound Power & Light Co. v. Superior Court for Snohomish County,* 133 Wash. 308, 311, 233 P. 651 (1925). The inquiries regarding public interest and necessity are judicial corollaries which provide enforcement of that constitutional mandate. Accordingly, article I, section 16 requires the court to determine whether an agency has adequately proved that condemnation satisfies the three-part test before private property may be taken.

¶ 58 These constitutional safeguards to the right to own property provided by article I, section 16 are undermined by the majority's assertion of an overly-deferential standard which accepts agency declarations as conclusive absent fraud or arbitrary and capricious conduct. Majority at 593. Our respect for coordinate branches of government should not nullify an explicit constitutional provision requiring the judiciary to provide a check upon taking of private property.

¶ 59 Furthermore, long-standing jurisprudence of this court mandates that legislative determinations do not preclude judicial examinations of the decision. *See, e.g., Decker v. State,* 188 Wash. 222, 227, 62 P.2d 35 (1936) ("[W]hether the use be 'really public' is for the courts to determine, and in the determination of that question they will 'look to the substance rather than the form, to the end rather than to the means.' " (quoting *Puget Sound Power & Light Co.,* 133 Wash. at 312, 233 P. 651; *State ex. rel. Andersen v. Superior Court for Lincoln County,* 119 Wash. 406, 410, 205 P. 1051 (1922)) ("The legislature can declare in the first instance that the purpose is a public one, and it remains the duty of the court to disregard such assertion if the court finds it to be unfounded."); *Healy Lumber Co. v. Morris,* 33 Wash. 490, 501, 74 P. 681 (1903) ("Under such circumstances the case comes to the court ***430** without any presumption one way or the other on the subject of public use, but is to be tried by the court like any other question that is submitted to its discretion.").

****603** ¶ 60 Judicial abdication of such a constitutional mandate unjustifiably expands the power of the legislature and agencies in contravention of the clear terms of article I, section 16. Our constitution's use of the word "shall" is imperative and operates to create a duty on the courts. *See, e.g., Crown Cascade, Inc. v. O'Neal,* 100 Wash.2d 256, 668 P.2d 585 (1983). Only by ignoring that provision can the majority reach its standard of deference to the agency rather than judicial review. *See* WASH. CONST. art. I, § 29 ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.").

II. FAILURE TO PROVIDE PROPER NOTICE

¶ 61 Sound Transit's exercise of eminent domain in this case was wrongful from the beginning due to its failure to provide proper notice in accordance with pertinent laws, and its own procedures.

¶ 62 Municipal corporations do not have an inherent power of eminent domain and may exercise such power only when expressly authorized by the legislature and in accordance with that authority. *See, e.g., Stojack,* 53 Wash.2d at 60, 330 P.2d 567. Statutes conferring such power "must be strictly construed, both as to the extent of the power and as to the manner of its exercise." *Postal Tel.-Cable Co.,* 64 Wash. at 193, 116 P. 855.

¶ 63 RCW 81.112.080, which authorizes eminent domain by Sound Transit, declares that the exercise of such power shall be in the same manner as cities of the first class. Cities of the first class are required by RCW 35.22.288 to publish meaningful notices of meetings contemplating eminent domain. *Port of Edmonds v. NW. Fur Breeders Coop., Inc.,* 63 Wash.App. 159, 816 P.2d 1268 (1991).

***431** ¶ 64 If the condemning governmental entity fails to give proper notice, the judgment of public use and necessity must be reversed and the eminent domain process must begin anew. *Id.* at 169, 816 P.2d 1268. *See also Deaconess Hosp. v. Wash. State Highway Comm'n,* 66 Wash.2d 378, 405, 403 P.2d 54 (1965) (failure to provide notice when required constitutes arbitrary and capricious conduct).

¶ 65 Procedural errors, such as lack of proper notice, are questions of law reviewed de novo. *State v. Harris,* 114 Wash.2d 419, 441, 789 P.2d 60 (1990). Because statutes delegating eminent domain power are in derogation of the people's rights, *King County,* 33 Wash.2d at 82, 204 P.2d 514, a condemning agency must establish that notice requirements were fulfilled in order to validly exercise the power and deprive a person of property.

¶ 66 Under the express terms of RCW 35.22.288:

> [E]very city shall establish a procedure for notifying the public of upcoming hearings and the preliminary agenda for the forthcoming council meeting. Such procedure may include, but not be limited to, written notification to the city's official newspaper, publication of a notice in the official newspaper, posting of upcoming council meeting agendas, or such other processes as the city determines will satisfy the intent of this requirement.

¶ 67 Sound Transit passed Resolution No. 1-1 (Amended) adopting and amending rules and operating procedures for the Board. Ex. 14; 1 Verbatim Report of Proceedings (VRP) (Oct. 25, 2004) at 99. Section 16 of Resolution No. 1-1 (Amended) includes a requirement of public notice for upcoming meetings:

> Whenever feasible, the Board Administrator shall furnish the Agenda for meetings of the Board and Committees to one or more local newspapers of general circulation in advance of such meetings.

Ex. 14, at 12. But Sound Transit did not do so here. Additionally, sections 4.A. and 4.B. require notification to local newspapers of general circulation and radio and ***432** television stations that have on file with the Board a request to be notified. *Id.* at 5. Here, Sound Transit merely placed an agenda on their website.

¶ 68 Thus, Sound Transit did not comply with either the statute or its own rule in providing notice to the public of the meeting. Mere placement of the agenda on the website ****604** does not amount to

"furnishing" notice to local newspapers as required by section 16 of Resolution No. 1-1 (Amended). Absent even the simplest communication concerning the agenda to one or more local newspapers of general circulation via fax, telephone, postcard, or even e-mail, such a posting does not constitute a "furnishing" of the agenda in any meaningful sense.

¶ 69 The majority ignores Sound Transit's requirements under section 16 of its own resolution, offering a footnote to affirm the trial court's conclusion that Sound Transit complied with its own internal rule. *See* Majority at 594-595 n. 3. The majority confuses the analysis by applying the text of RCW.35.22.288 only to the actions taken by Sound Transit.

¶ 70 Proper analysis requires consideration of compliance with *the procedures* that Sound Transit adopted pursuant to RCW 35.22.288. Agencies and municipal corporations *must* comply with internal procedures that are promulgated pursuant to statutory requirement. Compliance is a necessary implication of a statutory mandate. RCW 35.22.288 requires that procedures be adopted by Sound Transit and Sound Transit's statutorily-mandated procedures (i.e., section 16 of Resolution No. 1-1 (Amended)) require that Sound Transit furnish notice to newspapers. Sound Transit's adopted procedures provide the first standard for measuring the adequacy of Sound Transit's actions. We should hold that agencies and municipal corporations cannot ignore their own procedures, and that Sound Transit's failure to comply with its own procedures alone requires reversal of the trial court. [FN4]

> FN4. The majority, however, contends that we should ignore Sound Transit's compliance or non-compliance with its own adopted standards. Majority at 594-95 n. 3. The majority's contention is misguided. Rightful exercise of judicial review under article I section 16 and the rule of law require that we hold Sound Transit's noncompliance with its own procedures as fatal.

¶ 71 ***433** Sound Transit further violated the express terms of the RCW 35.22.288 by placing the meeting agenda only on the website. RCW 35.22.288' s enumeration of methods for notifying the public of upcoming hearings and the preliminary agenda for such meetings does not purport to be exhaustive. The statute limits the range of acceptable notice to processes that will satisfy the intent of the notification statute.

¶ 72 When the term "posting" is used in notice statutes, it always refers to posting of notice in a physical public place or affected area (e.g., on the property itself), but does not refer to posting on a website. RCW 35.13.140 (every ordinance must be published at least once in a newspaper and posted in at least "three public places"); RCW 35.27.300 (every ordinance must be published at least once in a newspaper and posted); RCW 43.21 C.080 (notice of action by governmental agency must be published in a newspaper, mailed, and posted at the project site).

¶ 73 Although website posting of the agendas of meetings may help satisfy notice requirements if combined with other methods of communication, this new technology and its low level of coverage among the public renders web posting insufficient to alone meet the requirements of RCW 35.22.288.

¶ 74 This conclusion is bolstered by the importance of the property rights that are implicated. Nor is the notice burden on an agency particularly onerous since there are simple, cost-effective, and commonly-accepted processes to notify the public. Contrary to one Sound Transit employee's testimony that it was considered "unseemly" by the agency to notify property owners individually, majority at 592; 1 VRP (Oct. 25, 2004) at 31, all Washington cities use the same statutory authority and have successfully used appropriate methods of notice for years.

¶ 75 ***434** As the majority notes, there is little case law considering the sufficiency of web posting for notice requirements. Majority at 595. Indeed, there is *none* upholding notice solely through web posting. One federal court has specifically *rejected*

electronic means and internet notice alone as sufficient to notify a class of plaintiffs for a class action lawsuit. *See Reab v. Elec. Arts, Inc.,* 214 F.R.D. 623, 631 (D.Colo.2002). The dearth of cases on web-notice can be attributed to the internet's status as a new and emerging technology ****605** which large segments of our population have not yet accessed. No case, until this majority, has held web posting notice sufficient.

¶ 76 It is also worthy of note that although RCW 35.22.288's enumeration of methods for notification is not exhaustive, the legislature did *not* say web posting gives sufficient notice. I would not rewrite the statute, but would hold that website posting *alone* does not satisfy RCW 35.22.288 (or other notice requirements in statute).

¶ 77 Additionally, the actual notice provided by Sound Transit in this case was inadequate under RCW 35.22.288. The actual property was not identified in the agenda, so that neither the Millers nor the public would know *this* property was to be taken.

¶ 78 As stated above, statutes conferring eminent domain power "must be strictly construed, both as to the extent of the power and as to the manner of its exercise." *Postal Tel.-Cable Co.,* 64 Wash. at 193, 116 P. 855. Because such statutes are in derogation of a constitutional right, *King County,* 33 Wash.2d at 82, 204 P.2d 514, effective notice must require that the agenda fairly apprise a reasonable person of the actual land under consideration for condemnation.

¶ 79 The notice statute's purpose is to fairly and sufficiently apprise those who may be affected of the nature and character of the action so that they may intelligently prepare for the hearing. *Barrie v. Kitsap County,* 84 Wash.2d 579, 585, 527 P.2d 1377 (1974); *Nisqually Delta Ass'n v. City of DuPont,* 103 Wash.2d 720, 727, 696 P.2d 1222 (1985).

¶ 80 ***435** Sound Transit, like other agencies, is required to have public meetings to assure public input in decision making. *See* RCW 42.30.010-.920. [FN5] Public notice that insufficiently apprises those who may be affected undermines the public confidence and trust that is placed into those legislative bodies and their decision-making abilities. [FN6]

> FN5. The Open Public Meetings Act of 1971 declares principles underlying public input and awareness of agency meetings: The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. RCW 42.30.010.

> FN6. The Open Public Meetings Act contains a notice provision similar to the one directly at issue here: No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void. RCW 42.30.060(1).

¶ 81 Here, the agenda posted on the Sound Transit website contains a general description that Sound Transit would be considering condemning property for the South Tacoma Commuter Rail Station. [FN7] This did not sufficiently apprise the Millers or *the public* which actual property constituted the agenda item. Identification of the property could be accomplished through a listing by street address, by owner name, or by parcel number. I disagree with the majority in the conclusion that "notice that a condemnation in the area would be considered," Majority at 596, satisfies the

applicable requirements. Notice of condemnation "in the area" is simply inadequate. Because of the protection ***436** our constitution gives to the right to private property and the limited nature of eminent domain, I would hold that the statute requires specific identification of the property to be condemned.

> FN7. The meeting agenda read:
> Resolution No. R2003-13--Authorizing the Executive Director to acquire, dispose, or lease certain real property interests by negotiated purchase, by condemnation, (including settlement) condemnation litigation, or entering administrative settlements, and to pay eligible relocation and re-establishment benefits to affected owners and tenants as necessary for the construction of the Lakewood and South Tacoma Commuter Rail Stations....
> Ex. 12.

III. UNSUBSTANTIATED PUBLIC USE DETERMINATION

¶ 82 Sound Transit's exercise of eminent domain in this case was also wrongful due to ****606** its failure to prove public necessity for the taking in accordance with applicable constitutional standards.

¶ 83 Article I, section 16's mandate is that public use be a judicial determination, and that statutes conferring such power must be construed strictly. Judicial inquiry into public use requires an inquiry into public necessity as a judicial corollary to provide enforcement of the constitutional mandate. As this court has previously maintained:

> "[p]ublic use" and "necessity" cannot be separated with scalpellic precision, for the first is sufficiently broad to include an element of the latter. Can it be said that a "contemplated use" that does not include an element of "necessity" meets the constitutional mandated that it "be really public?" We think not.

¶ 84 *Theilman,* 59 Wash.2d at 594, 369 P.2d 503.

¶ 85 I reject the majority's conclusion that great deference be given to agency declarations of necessity. This would make agencies nearly immune from judicial review of public use. Although declarations of public use and necessity are properly legislative declarations *in the first instance,* our overriding constitutional duty requires independent judicial determinations *in the final instance.*

¶ 86 The court should require condemning agencies to make an objective, affirmative showing that the declaration of public use is based upon substantial evidence. *See State v. Burch,* 7 Wash.App. 657, 660, 501 P.2d 1239 (1972). The trial court must make findings that support the legal conclusion as to the necessity of the taking. *See* ****437**City of Des Moines v. Hemenway,* 73 Wash.2d 130, 140-41, 437 P.2d 171 (1968). The condemning agency must establish that the declaration was made "honestly, fairly, and upon due consideration" of the facts and circumstances. *City of Tacoma v. Welcker,* 65 Wash.2d 677, 684, 399 P.2d 330 (1965).

¶ 87 Judicial review of public necessity must also recognize our case law that an agency declaration will not be upheld where it is arbitrary or capricious, or through abuse of discretion, violation of law, improper motives, or collusion. *Stojack,* 53 Wash.2d at 64, 330 P.2d 567. Declarations based upon fraud or constructive fraud will not be upheld. "To establish constructive fraud petitioners must show willful and unreasoned action without consideration and regard for facts or circumstances." *In re Port of Seattle,* 80 Wash.2d 392, 398, 495 P.2d 327 (1972); *cf. Port of Olympia v. Deschutes Animal Clinic, Inc.,* 19 Wash.App. 317, 321, 576 P.2d 899 (1978) ("[W]e believe that the term constructive fraud is misleading in this context. Our courts, in actuality, review the declaration [of necessity] under the arbitrary and capricious standard, and we see no merit in applying a different label to that well-known test.").

¶ 88 Particularly relevant here is this court's language in *Postal Telegraph-Cable Co.,* 64 Wash. at 195, 116 P. 855:

> It is sufficient to make a strong *prima facie* case, but when convincing evidence is adduced by the

> owner that the land sought is not reasonably necessary, and that a slight change of location to other of his land will equally meet the necessity of the taker and be of much less damage to the owner, then it is incumbent upon the taker to rebut such evidence, since the refusal to make such change, if unexplained would amount to oppression and be an abuse of the power.

¶ 89 Courts reviewing public necessity declarations should also find guidance from this court's decision in *Deaconess,* 66 Wash.2d at 405-06, 403 P.2d 54, wherein we delineated several factors that are important for consideration:

> By what tests should the court gauge administrative decisions? Here are the principal standards: Did the agency proceed in accordance with and pursuant to constitutional and ***438** statutory powers? Were the agency's motives honest and intended to benefit the public? Were they honestly arrived at--that is, free from influence of fraud and deceit? Were they free of any purpose to oppress or injure--even though injury and damage to some may be inherent in accomplishing the particular public benefit? Did the administrative agency give notice, where notice is ****607** due, and hear evidence where hearings are indicated? Did the agency make its decision on facts and evidence? Were its actions in the last analysis rational, that is, based upon a reasonable choice supported by facts and evidence? If the answers to all of these queries are in the affirmative, then the decision of an administrator, unless placed under complete judicial review by law, cannot be held arbitrary, capricious, unreasonable or oppressive by the courts.

¶ 90 Here the majority erroneously confirms that Sound Transit's public necessity determination was correct. Based upon this record, however, Sound Transit did *not* demonstrate that its declaration was made "honestly, fairly and upon due consideration" of the facts and circumstances. *See Welcker,* 65 Wash.2d at 684, 399 P.2d 330.

¶ 91 First, Sound Transit's determination that condemning Miller's property constituted a public necessity was based upon an erroneous factual assertion that there were contamination problems with other sites. As the majority acknowledges, "At some point during the process, Sound Transit appears to have erroneously believed that the alternative sites were contaminated but that the Miller property was not." Majority at 598. Indeed, the trial court stated in its findings that Sound Transit represented at public meetings that Superfund problems inhibited alternative locations, but that such representations were not true. Clerk's Papers (CP) at 249 (Findings of Fact 19).

¶ 92 The record here requires us to conclude that alleged Superfund problems were wrongly relied upon by Sound Transit in making its determination. Only by adopting a rubber-stamp standard of review at odds with article I, section 16 and relevant case law can the majority look the ***439** other way. [FN8] To rely upon clearly erroneous factual information of such magnitude amounts to arbitrary or capricious conduct. *See Welcker,* 65 Wash.2d at 684, 399 P.2d 330 ("Arbitrary and capricious conduct is willful and unreasoning action, without consideration and regard for facts or circumstances.").

> FN8. *See* majority at 598 ("[I]t is not the role of the court to take a second look at the various environmental considerations at issue. As long as Sound Transit considered the environmental impacts, it is not for the court to substitute its judgment in the absence of some demonstration of fraud or arbitrary and capricious conduct.").

¶ 93 Additionally (and more fundamentally), neither Sound Transit Resolution No. R2003-13 nor Sound Transit's petition filed with the trial court contains particularized facts supporting a finding that taking Miller's property was a public necessity. The trial court hearing should have required Sound Transit to make a showing of substantial evidence in support of its public necessity declaration. Sound Transit has instead relied consistently upon the proposition that agency conclusions are conclusive. The constitutional mandate of article I,

section 16 and our case law do not countenance rubber-stamp review by the judiciary of challenged public necessity declarations without a showing of evidence in support.

¶ 94 Consistent with this failure to prove facts supporting a finding that Miller's property is a public necessity, Sound Transit also failed to offer evidence rebutting Miller's evidence establishing the alternative site. Several cases have addressed a condemning agency's failure to properly consider alternatives. *See, e.g., State ex rel. Lange v. Superior Court for King County,* 61 Wash.2d 153, 377 P.2d 425 (1963); *Wagle v. Williamson,* 51 Wash.App. 312, 315-16, 754 P.2d 684 (1988); *State v. Burch,* 7 Wash.App. 657, 501 P.2d 1239 (1972); *State Parks & Recreation Comm'n v. Schluneger,* 3 Wash.App. 536, 475 P.2d 916 (1970) . In these cases, alternatives were proffered by the property owner, but the condemning agency rebutted the testimony. Sound Transit's failure to offer rebutting evidence here contrasts sharply.

¶ 95 ***440** Sound Transit's errors of commission and omission are reflected in the trial court's conclusion that: "[Sound Transit] may have negligently omitted and missed some facts and evidence which ideally should have been considered, and if considered could have reasonably led to a different result." CP at 252 (Conclusion of Law 12). Nonetheless, the trial court concluded that such "error" was not fatal. *Id.* The trial court's ****608** conclusion is inconsistent with the relevant legal standard and I would reverse. Deference of the courts to agency decisions which are procedurally flawed and based on facts known to be false diminishes public confidence in government and in the courts.

IV. CONCLUSION

¶ 96 In this case, "posting" on the website did not necessarily furnish notice either to the owner or to the public. By upholding Sound Transit's taking of private property through a process admittedly lacking proper notice and based upon erroneous factual information, the majority utilizes a standard of review that is contrary to our constitution.

¶ 97 Article I, section 16's *express declaration* that the taking of private property for public use is a *judicial question* "without regard to any legislative assertion," is undermined by the majority's decision. The right of owners--and the public--to full and fair consideration before private property is taken is eroded.

¶ 98 I dissent.

SANDERS, J., concurs.

CHAMBERS, J., concurs in result only.

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(Cite as: 155 Wash.2d 612, 121 P.3d 1166)

C
HTK Management, L.L.C. v. Seattle Popular Monorail Authority
Wash.,2005.

Supreme Court of Washington,En Banc.
In the Matter of the Petition of the Seattle Popular Monorail Authority, a City Transportation Authority, to Acquire by Condemnation Certain Real Property for Public use as Authorized by Resolution No. 04-16.
HTK MANAGEMENT, L.L.C., Appellant,
v.
SEATTLE POPULAR MONORAIL AUTHORITY, a/k/a Seattle Monorail Project, Respondent.
No. 76462-0.

Argued March 17, 2005.
Decided Oct. 20, 2005.

Background: City transportation authority filed petition for condemnation of private property to be used for a monorail station. Property owner filed motion to dismiss case for lack of subject matter jurisdiction, and the Superior Court, King County, Jeffrey M. Ramsdell, J., denied the motion. The Superior Court subsequently denied property owner's motion for reconsideration, and property owner appealed. The Supreme Court accepted certification from the Court of Appeals.

Holdings: The Supreme Court, Madsen, J., held that:

(1) city's condemnation powers applied by inference to transportation authority;

(2) transportation authority's condemnation of property owner's entire property was necessary for construction, operation, and maintenance of monorail station; and

(3) property owner was not entitled to attorney fees.

Affirmed.

J.M. Johnson, J., filed a dissenting opinion, in which Sanders, J., joined.

Chambers, J., concurred in result only.
West Headnotes
[1] Eminent Domain 148 ⚿9

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k9 k. To Municipality. Most Cited Cases
City's condemnation powers also applied by inference to transportation authority created by city; although statute setting forth transportation authority's condemnation powers did not specify the procedures that transportation authority was required to use, transportation authority was subject to all standard requirements of a governmental entity, and taking such requirements into account, the condemnation powers followed by a city could be applied by implication to transportation authority. West's RCWA 35.95A.020, 35.95A.040, 35.95A.050.

[2] Eminent Domain 148 ⚿9

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k9 k. To Municipality. Most Cited Cases
A municipal corporation does not have inherent power of eminent domain and may exercise such

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power only as is expressly authorized by the legislature.

[3] Eminent Domain 148 ⚿8

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k8 k. Construction and Operation of Legislative Acts in General. Most Cited Cases
Statutes granting the power of eminent domain are to be strictly construed.

[4] Eminent Domain 148 ⚿9

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k9 k. To Municipality. Most Cited Cases
While the legislature's grant of the eminent domain power to a municipality is to be construed strictly, it is not to be construed so strictly as to defeat the purpose of the legislative grant.

[5] Eminent Domain 148 ⚿8

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k8 k. Construction and Operation of Legislative Acts in General. Most Cited Cases
Even though a power of eminent domain is not given in specific words, it may be implied if its existence is reasonably necessary to effect the purpose of the condemning authority.

[6] Eminent Domain 148 ⚿8

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k8 k. Construction and Operation of Legislative Acts in General. Most Cited Cases
The legislature must confer not only the power to condemn, but must also prescribe the method by which it is to be done.

[7] Eminent Domain 148 ⚿8

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k8 k. Construction and Operation of Legislative Acts in General. Most Cited Cases
Where the legislature has failed to provide a procedure for condemnation, either directly or by implication or by reference to other acts having a similar purpose, the condemning entity has no authority to condemn.

[8] Eminent Domain 148 ⚿55

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k55 k. In General. Most Cited Cases
As a general rule, when a state delegates to a municipality the right to condemn private property for a public use but the statute delegating that authority does not provide a method for its exercise, the general law of the state prescribing the procedure, and the method of ascertaining the damages is, by implication, a part of the law delegating the power.

[9] Eminent Domain 148 ⚿45

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k44 Property Subject to Appropriation
148k45 k. In General. Most Cited Cases
A municipality has no power to condemn outside its limits in the absence of express authority to do so.

[10] Statutes 361 ⚿301

361 Statutes
361IX Initiative
361k301 k. Initiative in General. Most Cited Cases
An initiative passed by the electorate is the same exercise of sovereignty as that exercised by the legislative authority.

[11] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review

30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
The meaning of a statute is inherently a question of law and the Supreme Court's review is de novo.

[12] Statutes 361 ⚿181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Statutes 361 ⚿184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases
The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose.

[13] Statutes 361 ⚿205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases

Statutes 361 ⚿206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases

Statutes 361 ⚿223.2(.5)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.2 Statutes Relating to the Same Subject Matter in General
361k223.2(.5) k. In General. Most Cited Cases
Courts interpret a statute by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question.

[14] Statutes 361 ⚿190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
If a statute can reasonably be interpreted in more than one way, then it is ambiguous, and courts may resort to principles of statutory construction to assist in interpreting it.

[15] Eminent Domain 148 ⚿13

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases

Eminent Domain 148 ⚿56

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation. Most Cited Cases
For a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really public, (2) the public interest requires it, and

(3) the property appropriated is necessary for that purpose. West's RCWA Const. Art. 1, § 16.

[16] Eminent Domain 148 ⚿67

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases
Although the legislature may declare that a particular use of property is a "public use" for purposes of condemnation, that determination is not dispositive; however, a legislative declaration is entitled to great weight. West's RCWA Const. Art. 1, § 16.

[17] Eminent Domain 148 ⚿56

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation. Most Cited Cases

Eminent Domain 148 ⚿68

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k68 k. Conclusiveness and Effect of Exercise of Delegated Power. Most Cited Cases
In a condemnation case, the question of necessity, and thus the standard of judicial review of a declaration of public necessity, differs from that applied to a declaration of public use; a declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud. West's RCWA Const. Art. 1, § 16.

[18] Eminent Domain 148 ⚿68

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k68 k. Conclusiveness and Effect of Exercise of Delegated Power. Most Cited Cases
City transportation authority's determination to condemn a fee interest in the entire amount of property owner's property was a legislative question, reviewed under the legislative standard for necessity.

[19] Eminent Domain 148 ⚿58

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k58 k. Extent of Appropriation. Most Cited Cases
City transportation authority's condemnation of a fee interest in property owner's entire property was " necessary" for the construction, operation, and maintenance of a public monorail station; record supported transportation authority's contention that it needed all of the property for a substantial period of time to build and construct the monorail station, and might need all of the property indefinitely.

[20] Eminent Domain 148 ⚿68

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k68 k. Conclusiveness and Effect of Exercise of Delegated Power. Most Cited Cases
If a condemning authority has conducted its deliberations on an action honestly, fairly, and upon due consideration for facts and circumstances, that action will not be considered arbitrary and capricious, even though there be room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached.

[21] Eminent Domain 148 ⚿265(1)

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k265 Costs, Fees, and Expenses
148k265(1) k. In General. Most Cited

Cases
Property owner was not entitled to attorney fees in proceedings to challenge condemnation of property by city transportation authority to build a monorail, where it was determined that transportation authority could acquire the property. West's RCWA 8.25.075(1).

****1168** George Kresovich, Timothy D. Benedict, Hillis Clark Martin & Peterson, Seattle, for Appellant.
P. Stephen DiJulio, Roger Duane Mellem, Foster Pepper & Shefelman PLLC, Seattle, for Respondent.
William R. Maurer, Charity Osborn, Institute for Justice/WA State Chapter, Seattle, Jeanette Motee Petersen, Bellevue, for Amicus Curiae (Institute for Justice Washington Chapter).
Daryl A. Deutsch, Bellevue, for Amicus Curiae (Paul D. and Josephine M. Fiorito).
Paul Arley Harrel, Alan Lea Wallace, Williams Kastner & Gibbs PLLC, Seattle, for Other Party (Ampco System Parking).
John Robert Zeldenrust, King County Prosecutor's Office/Appellate Unit, Seattle, for Other Party (King County of Finance).
Larry John Smith, Graham & Dunn PC, Seattle, for Other Party (Rokan Partners).
MADSEN, J.
615** ¶ 1 HTK Management, L.L.C. (HTK), a property owner in downtown Seattle, challenges a trial court order adjudicating public use and necessity that authorizes Seattle Popular Monorail Authority, a/k/a Seattle Monorail Project (SMP), a city transportation authority, to condemn its property to build a monorail station. In this case, both parties agree that the use of the property here for construction of public transportation is a fundamental616** "public use." [FN1] However, HTK alleges that SMP lacks statutory authority to condemn property in the first place and, alternatively, that the adjudication of public use and necessity was improper because, HTK contends, while SMP permissibly condemned a fee interest in the property comprising the monorail footprint, it should have been limited to a multiyear lease on the remainder.

FN1. Contrary to the dissent's view, the facts and legal issues in this case bear no resemblance to the recent decision in the United States Supreme Court in *Kelo v. City of New London,* --- U.S. ----, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005). In *Kelo,* the City of New London condemned property in order to develop a certain area of the city, which included the condemnation of property in order to build a private hotel and new private residences to be owned by new home owners. *Id.* In contrast, in this case, the property is being condemned to build a public monorail, an undisputed, historic public use.

¶ 2 We hold that SMP has statutory authority to condemn property and affirm the trial court's order adjudicating public use and necessity.

FACTS

¶ 3 Traffic is a significant problem in the state of Washington. In 2002, the Washington Alliance for a Competitive Economy reported that " [t]ransportation remains the dominant infrastructure concern in the state, particularly in the Central Puget Sound region" and provided the following data: (1) congestion in the Seattle-Everett Corridor ranks second only to Los Angeles, (2) Washington ranks 32nd on per capita state disbursements for highways and local roads, (3) Washington's 23-cent gas tax, unchanged since 1991, ranks 14th in the nation, and (4) Seattle ranked just 64th on *Expansion Management* magazine's September 2001 evaluation of the "100 Most Logistics Friendly Cities." [FN2]

FN2. Ass'n of Wash. Business, *WashACE 2002 Competitiveness Report:* "Will Washington Shrug?", Transportation at *http:// www.awb.org /policy/competitiveness/2002reportmain .htm* (last visited Oct. 18, 2005).

¶ 4 The 2002 report concludes that "[w]ith most business in Washington eventually involving the

movement of goods and people through the congested metropolitan Puget ***617** Sound corridor, gridlock puts the economic competitiveness of all communities at risk." [FN3]

FN3. *Id.*

¶ 5 Since 1997, Seattle residents have voted four times in favor of building an expanded monorail public transportation system within the city of Seattle. [FN4] In November 1997, voters in the city of Seattle passed Initiative 41, creating a public development****1169** authority, the Elevated Transportation Company, to build, maintain, and operate an elevated, electrically powered mass transit system consisting of specified stations and terminals serving the four quadrants of Seattle and running through downtown. The system would be generally "X" shaped and would lie entirely within Seattle. [FN5]

FN4. Currently there is a one-mile monorail system in Seattle, operating between Seattle Center and downtown Seattle. This monorail was built for the World's Fair held in Seattle in 1962.

FN5. City of Seattle Proposition No. 2 (Initiative 53: The Monorail), *City Attorney's Explanatory Statement* (Nov. 7, 2000), King County Records, Elections & Licensing Servs. Div., *King County On-Line Voter's Pamphlet, available at http://www.metrokc. gov/elections/2000 nov/pamphlet/pamph. htm* (as of Oct. 18, 2005).

¶ 6 In July 2000, the Seattle City Council passed Ordinance 120049, amending Initiative 41. Among other things, the ordinance dissolved the Elevated Transportation Company and deleted the requirement that the city council make funds available for the system if necessary by either issuing bonds or raising the city's business and occupation tax.[FN6]

FN6. *Id.*

¶ 7 In November 2000, voters in Seattle voted the second time for the monorail, passing Seattle Proposition No. 2 (Initiative 53), which reestablished the Elevated Transportation Company. The Elevated Transportation Company would have up to two years to complete a plan for a monorail system in Seattle. Once the monorail plan was completed, Initiative 53 provided that the Seattle City Council would be required to place the monorail plan before Seattle voters at the next election. Initiative 53 also provided***618** for the repeal of any ordinance that had repealed or amended prior Initiative 41 and that was inconsistent with Initiative 53, and for reinstatement of that part of Initiative 41 that had been repealed or amended.[FN7]

FN7. *Id.*

¶ 8 In 2002, the Washington State Legislature enacted an enabling statute which authorized voters from cities with a population over 300,000 to create a "city transportation authority" to build a public monorail within that city. Ch. 35.95A RCW. RCW 35.95A.050 provides that a city transportation authority will have a number of powers including the power to "acquire by purchase, condemnation, gift, or grant and to lease, construct, add to, improve, replace, repair, maintain, operate, and regulate the use of public monorail transportation facilities." RCW 35.95A.050(1).

¶ 9 A city transportation authority may fix rates, tolls, fares, and charges for use of facilities and may establish various routes and classes of service. RCW 35.95A.050(2). Additionally, a city transportation authority may "[n]otwithstanding the provision of any law to the contrary, and in addition to any other authority provided by law," contract with one or more vendors for the design, construction, operation, or maintenance or other service related to the development of a monorail public transportation system. RCW 35.95A.050(3)(a).

¶ 10 Finally, among other powers, a city transportation authority will have "all other powers necessary and appropriate to carry out its responsibilities, including without limitation the power to sue and be sued, to own, construct, purchase, lease, add to, and maintain any real and personal property or property rights necessary for the conduct of the affairs of the authority, to enter into contracts, and to employ the persons as the authority deems appropriate. An authority may also sell, lease, convey, or otherwise dispose of any real or personal property no longer necessary for the conduct of the affairs of the authority." RCW 35.95A.050(8).

619** ¶ 11 Seattle residents voted for the third time in favor of the monorail in November 2002, passing Citizen Petition No. 1: Proposed Seattle Monorail Authority. Citizen Petition No. 1 created a Seattle city transportation authority, now named Seattle Popular Monorail Authority, a/k/a Seattle Monorail Project, (SMP), respondent in this case. Citizen Petition No. 1 implemented the initial phase of a five-line city monorail system by authorizing the construction and operation of a 14-mile monorail line, the "Green Line." The Green Line will connect Ballard, Key Arena, Seattle Center, Belltown,*1170** downtown Seattle, Pike Place Market, Benaroya Hall, the ferry terminal, Pioneer Square, the Chinatown-International District, the King Street train station, Safeco Field, the Qwest Field, and West Seattle. The Green Line will have 19 monorail stations and is intended to connect with buses, ferries, light rail, and trains. Construction is scheduled to begin in 2005.

¶ 12 In November 2004, Seattle residents voted again, for the fourth time, for the monorail, defeating Initiative 83. Initiative 83, if enacted into law, would have forbidden the city of Seattle from allowing the use of its city rights-of-way for any new monorail transit facilities, such as the Green Line. [FN8]

FN8. City of Seattle Initiative No. 83, *City Attorney's Explanatory Statement* (Nov. 2, 2004), King County Records, Elections & Licensing Servs. Div., *Voter's Pamphlet-Ballot Measures, General and Special Elections, available at http://www.metrokc. gov/elections/ pamphlet/1204/ index.htm* (as of Oct. 18, 2005).

¶ 13 Seattle residents voted overwhelmingly in favor of the monorail-63.52 percent voted "no" for Initiative 83.[FN9]

FN9. *Official Final Results,* City of Seattle Initiative No. 83 (Nov. 2, 2004), *King County General and Special Election Results, available at http://www.metr okc. gov/elections/2004 nov/resPage16.htm* (as of Oct. 18, 2005).

¶ 14 On April 7, 2004, SMP passed Resolution No. 04-16 to acquire by condemnation certain property for the Second and Yesler station, the Pioneer Square station, in downtown Seattle. The property is currently a parking garage, commonly referred to as "the sinking ship garage" (the property). The property is owned in fee by the appellant, HTK. The property is also subject to a long-term ground ***620** lease. The tenant's ground lease ends in 2010, with the tenant possessing a 10-year option to extend the lease through 2020. The Second and Yesler station will be constructed on a triangle of property bounded by Second Avenue, Yesler Way, and James Street in downtown Seattle. The Second and Yesler station will provide an intermodal transportation function with connections to the ferry system, the waterfront street car, buses, and light rail.

¶ 15 SMP has not yet approved a final design for the Second and Yesler station. Some preliminary designs show the station footprint covering the entire property, other more recent designs show a smaller footprint. The final design will be determined by the "Design, Build, Operate, and Maintain" contractor, with the approval of SMP's board and the city of Seattle. The parties agree that regardless of the ultimate size of the Second and Yesler station, SMP needs the entire property for construction of the staging and development of the Green Line alignment in the vicinity of the Second

and Yesler station. After construction of the station, SMP currently has no planned use for any portion of the property that may remain uncovered by the final station design. SMP states that it would be premature to make definitive plans for the property that may possibly fall outside of the footprint. For example, a portion of the property may be used for loading and unloading passengers from para-transit vehicles, taxis, and tour buses. After the monorail is completed, SMP may lease or sell the unused portions of the property, if any.

¶ 16 On April 28, 2004, SMP filed a petition for condemnation in King County Superior Court and gave notice to HTK. On July 19, 2004, HTK entered into a stipulated order with SMP regarding the public use and necessity and preliminary possession of the subject property. HTK and SMP stipulated that the proposed use for the property is a public use, that the portion of the property covered by the station footprint is necessary for that use, and that the portion of the property not covered by the station footprint is necessary for that use until construction of the Green Line is complete.

***621** ¶ 17 On August 13, 2004, HTK filed a motion to dismiss the case for lack of subject matter jurisdiction. The trial court denied that motion, ruling that because the eminent domain procedures set forth in chapter 8.12 RCW govern condemnation actions brought by SMP, SMP has statutory authority to condemn property, and therefore the trial court had subject matter jurisdiction over the condemnation action.

****1171** ¶ 18 On September 13, 2004, the hearing on public use and necessity was held. The trial court denied HTK's motion for reconsideration of the order denying the motion to dismiss and entered an order adjudicating public use and necessity. HTK filed a notice of appeal and a motion for accelerated review. On October 1, 2004, the Court of Appeals granted HTK's motion for accelerated review.

¶ 19 This court accepted certification from the Court of Appeals.[FN10]

FN10. Amicus curiae briefs were submitted by the Institute for Justice Washington Chapter and by Paul and Josephine Fiorito.

ANALYSIS

1. Statutory Authority for SMP to Condemn

[1] ¶ 20 HTK first contends that chapter 35.95A RCW, the statute authorizing creation of SMP, does not specify the procedure for SMP to exercise its condemnation power. Accordingly, HTK argues that SMP is precluded from exercising that power.

¶ 21 RCW 35.95A.020(1) authorizes every city with a population greater than 300,000 to create a city transportation authority "to perform a public monorail transportation function." A city transportation authority created under the statute "is a municipal corporation, an independent taxing ' authority' within the meaning of Article 7, section 1 of the state Constitution, and a 'taxing district' within the meaning of Article 7, section 2 of the state Constitution." RCW 35.95A.020(1).

[2][3][4][5] ***622** ¶ 22 A municipal corporation does not have inherent power of eminent domain and may exercise such power only as is expressly authorized by the legislature. *In re Pet. of Seattle,* 96 Wash.2d 616, 638 P.2d 549 (1981) (*Westlake*); *City of Des Moines v. Hemenway,* 73 Wash.2d 130, 437 P.2d 171 (1968); *City of Tacoma v. Welcker,* 65 Wash.2d 677, 399 P.2d 330 (1965). Statutes granting the power of eminent domain are to be strictly construed. *City of Seattle v. State,* 54 Wash.2d 139, 338 P.2d 126 (1959). However, while the legislature's grant of the eminent domain power to a municipality is to be construed strictly, it is not to be construed so strictly as to defeat the purpose of the legislative grant. *Welcker,* 65 Wash.2d at 683, 399 P.2d 330. "[I]t is not necessary that [eminent domain statutes] cover in minute detail everything which may be done to carry out their purpose. Even though a power is not given in specific words, it may be implied if its existence is reasonably necessary to effect the purpose of the condemning authority." *In re Pet. of*

Port of Grays Harbor, 30 Wash.App. 855, 862, 638 P.2d 633 (1982) (citing *State ex rel. Hunter v. Superior Court,* 34 Wash.2d 214, 217, 208 P.2d 866 (1949)); *see also Chem. Bank v. Wash. Pub. Power Supply Sys.,* 99 Wash.2d 772, 792, 666 P.2d 329 (1983) ("a municipal corporation's powers are limited to those conferred in express terms or those necessarily implied").

[6][7][8] ¶ 23 The legislature must confer not only the power to condemn but must "prescribe the method by which it is to be done." *City of Tacoma v. State,* 4 Wash. 64, 66, 29 P. 847 (1892). Where the legislature has failed to provide a procedure, " either directly or by implication or by reference to other acts having a similar purpose," the condemning entity has no authority to condemn. *State ex rel. Mower v. Superior Court,* 43 Wash.2d 123, 131, 260 P.2d 355 (1953). As a general rule,

[w]hen a state delegates to a municipality the right to condemn private property for a public use but the statute delegating that authority does not provide a method for its exercise, the general law of the state prescribing the procedure, and the ***623** method of ascertaining the damages is, by implication, a part of the law delegating the power.

11A Eugene Mcquillin, The Law Of Municipal Corporations § 32.117, at 207-08 (3d ed.2000).

¶ 24 SMP's condemnation powers are set forth in RCW 35.95A.050(1). As HTK correctly states, RCW 35.95A.050(1) does not specify the procedure that SMP must use when exercising its condemnation power. ****1172** The question then is whether a method or procedure can be inferred from the statute.

¶ 25 Relying primarily on one case, *Mower,* HTK claims that condemnation procedures cannot be inferred and that the legislature must incorporate a particular Title 8 RCW procedure by reference or prescribe an alternative procedure to be used by the condemning entity in the authorizing statute. In *Mower,* a metropolitan park district brought a condemnation action pursuant to RCW 35.61.130, which granted the district that authority. The property owners resisted the condemnation, claiming that the statute failed to prescribe a condemnation procedure and, therefore, the district lacked authority to condemn. *Mower,* 43 Wash.2d at 127, 260 P.2d 355. On appeal, this court reiterated the constitutional requirement that before private property may be taken or damaged for a public or private use, just compensation must be made or be ascertained "in the manner prescribed by law." Const. art. I, § 16. The court noted that although a number of statutes set forth condemnation procedures for particular entities, none provided procedures for park districts. The court then observed that the general procedural statute upon which the park district relied had been repealed and opined that the legislature had intended to provide specific statutory procedures for specific condemning entities. Turning to RCW 35.61.130, the court found nothing in the district's authorizing statute "either directly or by implication or by reference to other acts having a similar purpose" setting forth the procedure for condemnation by a metropolitan park district. *Mower,* 43 Wash.2d at 131, 260 P.2d 355. Accordingly, the court held that the district had no ***624** authority to condemn the property at issue. *Id.* HTK claims that, as with the park district in *Mower,* SMP has no authority to condemn because the legislature did not provide a method for the exercise of its eminent domain power as required by article I, section 16 of the Washington Constitution.

[9] ¶ 26 SMP contends that HTK's reading of *Mower* is too broad, pointing to the language quoted above to the effect that a condemnation procedure may be implied. Further, SMP points to a distinction between RCW 35.95A.050(1) and the statute at issue in *Mower.* The park district statute in that case authorized a metropolitan park district to condemn territory outside the territorial limits of the proposing city, including areas of the unincorporated county.[FN11] Since condemnation procedures for both cities and counties might be implicated and because the court in *Mower* could not reasonably infer the procedure to be used by a park district from the authorizing statute or from other statutes relating to condemnation, the court declined to "make up such procedures out of whole cloth." *Mower,* 43 Wash.2d at 130, 260 P.2d 355.

FN11. A municipality has no power to condemn outside its limits in the absence of express authority to do so. *Hemenway,* 73 Wash.2d at 138, 437 P.2d 171.

[10] ¶ 27 In contrast, SMP points out that RCW 35.95A.050(1) authorizes SMP to condemn property only within the physical confines of the proposing city. Thus, unlike the authorizing statute in *Mower,* SMP argues that it can reasonably be inferred from RCW 35.95A.050 that the legislature intended SMP to use the general condemnation procedures prescribed for cities in chapter 8.12 RCW. SMP reasons that RCW 35.95A.050 authorizes the city to establish a "city transportation authority" that will operate within the boundaries of the city and provides that the transportation authority is to be created by city ordinance or by petition of the city's residents. RCW 35.95A.030(1), (2).[FN12] As such, SMP is a creature of the city. Accordingly, SMP contends, by ***625** necessary implication, the condemnation procedure for cities, chapter 8.12 RCW, is applicable to SMP.

FN12. An initiative passed by the electorate is the same exercise of sovereignty as that exercised by the legislative authority. *Maleng v. King County Corrs. Guild,* 150 Wash.2d 325, 330, 76 P.3d 727 (2003).

¶ 28 HTK claims that *Mower* requires that a method or procedure for condemnation must be express. First, HTK argues that there is little difference between the park district in *Mower* and SMP because, as with a transportation authority under chapter ****1173** 35.95A RCW, a park district is a municipal corporation that can be formed by only a first class city. Further, HTK contends both the park district statute and SMP's authorizing statute authorize condemnation outside their respective territorial limits. Finally, HTK argues that even if there is a distinction to be made on the scope of the condemnation power, territorial boundaries were not even mentioned by the *Mower* court.

¶ 29 We agree with SMP that HTK is reading *Mower* too broadly. In *Mower,* the court distinguished an earlier decision, *Town of Redmond v. Perrigo,* 84 Wash. 407, 146 P. 838 (1915). In *Perrigo* the property owner argued that the city of Redmond was without power to condemn because no procedure had been provided in the act authorizing condemnation. *Perrigo* was proceeding under the authority of the public utilities act, authorizing cities to condemn property for the purposes of supplying water. However, that statute did not include a method of condemnation. *Perrigo,* 84 Wash. at 409, 146 P. 838. The court rejected the challenge to the town's condemnation authority, stating that "[w]here the power is given, a method will be accorded." *Id.* at 409, 146 P. 838. The court then turned to the general condemnation statute and held that the statute provided the proper method for the town to follow. *Id. Mower* noted that the general condemnation statute referenced in *Perrigo* had been repealed and, therefore, the park district could not rely on that general authority. *Mower,* 43 Wash.2d at 130-31, 260 P.2d 355. *Perrigo,* like *Mower,* indicates that a procedure need not be expressly referenced in the authorizing statute and that general procedural statutes may impliedly provide the method for exercising the condemnation power.

***626** ¶ 30 Recent cases also suggest that procedures need not be expressly referenced in condemnation statutes. In *Port of Edmonds v. Northwest Fur Breeders Cooperative, Inc.,* 63 Wash.App. 159, 816 P.2d 1268 (1991), the property owners appealed an order of public use and necessity contending that the Port of Edmonds had failed to give proper statutory notice of the condemnation, which was authorized at a port hearing. The port argued that RCW 53.08.010, which authorizes ports to exercise the eminent domain power, requires the port to follow the procedure applicable to first-class cities and references chapter 8.12 RCW. The port contended that since it followed the procedures of chapter 8.12 RCW, it had satisfied statutory requirements. The Court of Appeals disagreed. It reasoned that because the condemnation was established by ordinance, the port was also required to comply with RCW 35.22.288, governing the adoption of

ordinances by first-class cities. Although the port's authorizing statute, RCW 53.08.010, did not reference RCW 35.22.288, the Court of Appeals nevertheless concluded that compliance with RCW 35.22.288 was required.

¶ 31 Similarly, *Silver Firs Town Homes, Inc. v. Silver Lake Water District,* 103 Wash.App. 411, 12 P.3d 1022 (2000), lends weight to SMP's argument. There the property owner claimed that the water district was required to give public notice of proposed rate changes, pursuant to RCW 35.22.288, which apply to first-class cities. The owner reasoned that because the district's authorizing statute, RCW 57.08.010, requires water districts to follow eminent domain procedures for cities, it should be required to follow the notice requirements for cities when engaging in rate setting. The court declined to imply a requirement that the district comply with the notice requirements of RCW 35.22.288 because water districts are not first-class cities. The court did, however, imply a requirement that the district follow the notice requirements under the Open Public Meetings Act of 1971 (OPMA), chapter 42.30 RCW, ***627** even though the water district statute, RCW 57.08.010, did not mention the OPMA.[FN13]

> FN13. We cite the case of *Fur Breeders* only to demonstrate that other statutes might provide the method or procedure necessary to carry out the condemnation authority.

¶ 32 Considering case law both before and since *Mower,* we hold that powers reasonably necessary to carry out a grant of the eminent domain power may be inferred from the authorizing statute or from other statutes.

[11][12][13][14] ¶ 33 The next step is to determine whether chapter 35.95A RCW implies ****1174** such procedures. The meaning of a statute is inherently a question of law and our review is de novo. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.,* 142 Wash.2d 543, 555, 14 P.3d 133 (2000); *Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd.,* 131 Wash.2d 345, 352, 932 P.2d 158 (1997). The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. *Am. Cont'l Ins. Co. v. Steen,* 151 Wash.2d 512, 518, 91 P.3d 864 (2004); *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wash.2d 1, 9, 43 P.3d 4 (2002). This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question. *Campbell & Gwinn,* 146 Wash.2d at 11, 43 P.3d 4. If, after this inquiry, the statute can reasonably be interpreted in more than one way, then it is ambiguous and resort to principles of statutory construction to assist in interpreting it is appropriate. *State ex rel. Citizens Against Tolls (CAT) v. Murphy,* 151 Wash.2d 226, 242-43, 88 P.3d 375 (2004); *Campbell & Gwinn,* 146 Wash.2d at 12, 43 P.3d 4.

¶ 34 Looking first to the language of the statute, a transportation authority can be created under RCW 35.95A.030 through a legislative act only by a city. RCW 35.95A.020 provides that a transportation authority created under the statute is a municipal corporation. A municipal corporation is defined as "a body politic established by law as an agency of the state-partly to assist in the civil government of the country, but chiefly to regulate and ***628** administer the local and internal affairs of the incorporated city, town, or district." *Lauterbach v. City of Centralia,* 49 Wash.2d 550, 554, 304 P.2d 656 (1956). Further, RCW 35.95A.040 provides that the transportation authority is "subject to all standard requirements of a governmental entity pursuant to RCW 35.21.759," which imposes on public corporations the general laws regulating the local government that created the entity. Taking these provisions into account and considering the fact that the legislature intended to grant condemnation powers to an entity created pursuant to chapter 35.95A RCW, we hold that, by implication, chapter 8.12 RCW, the procedure to be followed by a city, applies to SMP.

¶ 35 Next, HTK argues that merely because a transportation authority can be created only by a city does not mean that chapter 8.12 RCW is the obvious statute to be applied to SMP. HTK cites

Fur Breeders for the proposition that condemnation procedures for cities are not limited to chapter 8.12 RCW. However, *Fur Breeders* suggests that chapter 8.12 RCW, in addition to other notice statutes specifically applying to cities, provides the requirements for the exercise of the eminent domain power. SMP does not contend that it is subject only to the requirements of chapter 8.12 RCW.

¶ 36 Finally, SMP argues that the procedures provided for an exercise of eminent domain are necessary to satisfy due process and that due process does not require the legislature to expressly designate the procedure to be followed when there is a statutory procedure available and is implied. SMP is correct. Due process concerns are at the core of article I, section 16's requirement that a method for condemnation be provided by law. HTK does not complain that its due process rights have been violated, and it has cited no case holding that due process requires the method of condemnation to be cross-referenced in legislation authorizing condemnation. Accordingly, we hold that SMP properly followed the condemnation method prescribed for cities in chapter 8.12 RCW.

***629** *2. Public Use and Necessity Determination*

[15] ¶ 37 Washington's constitution provides that " [n]o private property shall be taken or damaged for public or private use without just compensation having first been made." Const. art. I, § 16. Under long standing Washington jurisprudence, this court has developed a three-part test to evaluate eminent domain cases. *State ex rel. Wash. State Convention & Trade Ctr. v. Evans,* 136 Wash.2d 811, 817, 966 P.2d 1252 (1998) (*Convention Center*). For a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really ****1175** public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose. *Convention Ctr.,* 136 Wash.2d at 817, 966 P.2d 1252 (citing *Westlake,* 96 Wash.2d at 625, 638 P.2d 549; *King County v. Theilman,* 59 Wash.2d 586, 593, 369 P.2d 503 (1962)).

[16] ¶ 38 A determination that an acquisition is for a "public use" is not precisely the same thing as determining it is a "public necessity," even though the two terms do overlap to some extent. *Hemenway,* 73 Wash.2d at 138, 437 P.2d 171. The "question [as to] whether the contemplated use be really public shall be a judicial question." const. art. I, § 16; *Dickgieser v. State,* 153 Wash.2d 530, 535, ¶ 10, 105 P.3d 26 (2005). Although the legislature may declare that a particular use of property is a "public use," that determination is not dispositive. *Dickgieser,* 153 Wash.2d at 535-36, ¶ 10, 105 P.3d 26. However, a legislative declaration is entitled to great weight. *Westlake,* 96 Wash.2d at 624-25, 638 P.2d 549 (citing *Hemenway,* 73 Wash.2d 130, 437 P.2d 171).

[17] ¶ 39 In contrast, the question of necessity, and thus the standard of judicial review of a declaration of public necessity, differs from that applied to a declaration of public use. *Convention Ctr.,* 136 Wash.2d at 823, 966 P.2d 1252. A declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud. *Hemenway,* 73 Wash.2d at 139, 437 P.2d 171 (citing *Welcker,* 65 Wash.2d 677, 399 P.2d 330; ***630** *State ex rel. Church v. Superior Court,* 40 Wash.2d 90, 91, 240 P.2d 1208 (1952)). [FN14]

FN14. The dissent concedes that this test is the proper test to be used by this court in eminent domain proceedings.

a. Public use of property to build a public monorail

¶ 40 Unlike in *Kelo v. City of New London,* --- U.S. ----, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), in this case it is undisputed that the use to which the property is to be put-public transportation-is a clear public use. Clerk's Papers (CP) at 15 (stipulation by the parties). Indeed, public transportation has been determined to be public use for nearly 100 years in Washington. *City of Seattle v. Byers,* 54 Wash. 518, 103 P. 791 (1909); *State ex rel. Thomas v. Superior Court,* 42 Wash. 521, 85 P. 256 (1906). [FN15]

FN15. The dissent concedes that construction of the public monorail is a public use.

b. Whether the determination of the property to be condemned is a judicial or legislative question

[18] ¶ 41 HTK claims that SMP's decision to condemn a fee interest in the entire property should be analyzed under the first prong of the test for " public use," rather than under the third prong of the test for "necessity." HTK asserts that SMP should have decided to condemn a fee interest in only the portion of the property that was likely to contain the monorail station and to condemn an easement interest in the remainder of the property that is to be used for construction staging and development of the Green Line alignment.

¶ 42 SMP correctly states that determinations by the condemning authority as to the type and extent of property interest necessary to carry out the public purpose have historically been considered legislative questions and are thus analyzed under the third prong of the test. In *City of Tacoma v. Humble Oil & Refining Co.,* 57 Wash.2d 257, 356 P.2d 586 (1960), property owners appealed an order of public use and necessity. In that case, the city sought to condemn a fee simple interest in the land, which would ***631** include the mineral rights. This court noted that the property owners recognized the rule that " 'the action of a public agency or a municipal corporation having the right of eminent domain in selecting land for a public use will not be controlled by the courts' " and is thus a legislative question. *Id.* at 258, 356 P.2d 586 (quoting *State ex rel. Tacoma Sch. Dist. No. 10 v. Stojack,* 53 Wash.2d 55, 64, 330 P.2d 567 (1958)). *See also Port of Grays Harbor,* 30 Wash.App. 855, 638 P.2d 633 (the court finding that it was a legislative question as to whether a fee ****1176** or easement property interest should be condemned). These cases providing deference to legislative questions are rooted in long standing Washington law. Since the turn of the century, Washington courts have provided significant deference to legislative determinations of necessity in the context of eminent domain proceedings. *See, e.g., State ex rel. Thomas v. Superior Court,* 42 Wash. 521, 524-525, 85 P. 256 (1906).

¶ 43 Other states agree that a condemning authority's decision as to the type and extent of property interest is a legislative question. *See, e.g., Westrick v. Approval of Bond of Peoples Natural Gas Co.,* 103 Pa. Comwlth. 578, 581, 520 A.2d 963 (1987) ("administrative decisions of a condemnor concerning the amount, location, or type of estate condemned are not subject to judicial review unless such decisions are in bad faith, arbitrary, capricious, or an abuse of power"; it is the condemnee's burden to prove an administrative abuse, and this burden is a heavy one to meet); *City of New Ulm v. Schultz,* 356 N.W.2d 846, 849 (1984) (finding that acquiring a fee interest in property was reasonably necessary; city need only show that acquiring a fee interest rather than an easement was a reasonable means of acquiring airport protection privileges); *Concept Capital Corp. v. Dekalb County,* 255 Ga. 452, 453, 339 S.E.2d 583 (1986) (court following the rule that, " '[i]n the absence of bad faith, the exercise rights of the right of eminent domain rests largely in the discretion of the authority exercising such right, as to the necessity and what and how much land shall be taken' ") (quoting *City of Atlanta v. Heirs of Champion,* 244 Ga. 620, 621, 261 S.E.2d 343 (1979)); ***632***St. Andrew's Episcopal Day Sch. v. Miss. Transp. Comm'n,* 806 So.2d 1105, 1111 (2002) (selection of the particular land to condemn as well as the amount of land necessary are legislative questions to be determined by the condemning authority). *City of Phoenix v. McCullough,* 24 Ariz.App. 109, 114, 536 P.2d 230 (1975) ("we believe the rule to be that a condemnor's determination of necessity should not be disturbed on judicial review in the absence of fraud or arbitrary and capricious conduct"); *Regents of Univ. of Minn. v. Chi. & NW Transp. Co.,* 552 N.W.2d 578 (Minn.Ct.App.1996) (analyzing whether university demonstrated that proposed taking is "necessary," reviewed under the legislative standard of review).[FN16]

FN16. The dissent criticizes the majority for citing out-of-state cases. Contrary to the dissent's claims, under long standing Washington jurisprudence out-of-state

> cases, while not controlling, are instructive. *See, e.g., Welcker,* 65 Wash.2d at 683, 399 P.2d 330 (citing out-of-state cases on eminent domain that follow Washington principles); *Thomas,* 42 Wash. at 525, 85 P. 256 (same).

¶ 44 HTK claims, though, that *Convention Center* changes the standard of review for this case and that SMP's decision to condemn a fee interest is thus a judicial question. In *Convention Center,* this court addressed a proposed expansion of the Washington State Trade and Convention Center. The legislature appropriated $111.7 million for the expansion but, as a condition, required the convention center to contribute $15 million. The convention center developed a plan that involved condemning property across the street from the existing convention center. The proposed expansion would sit four stories above street level. The three floors below were to be sold to a private developer at the same time as the condemnation. The private developer would contribute $15 million and would build the outer shell of the convention center. In return, the private developer would take a fee simple title to the remaining three floors for construction of retail and parking. The court determined that the condemnation was a "public use, " within the meaning of the Washington Constitution, and that the private development was " merely incidental." *Convention Ctr.,* 136 Wash.2d at 822-23, 966 P.2d 1252.

***633** ¶ 45 HTK claims that because the court in *Convention Center* held that a private use was merely incidental when it was within the "footprint" of the convention center, this court is required to undertake a "public use" examination because, in this case, property may be sold to a private party that is outside the "footprint" of the proposed monorail station.

¶ 46 HTK's reliance on *Convention Center* is misplaced and does not alter the rule, as ****1177** stated in *Humble Oil* and in *Port of Grays Harbor,* that decisions as to the amount of property to be condemned are legislative questions, reviewed under the legislative standard for necessity. Moreover, in *Convention Center,* the court was faced with a very different situation-condemnation of property on which a significant part was *never* going to be put to a public use. As SMP points out here, in contrast, the entire property will be put to a public use. As discussed above, public transportation has been determined to be a public use for nearly 100 years in Washington. *City of Seattle v. Byers,* 54 Wash. 518, 103 P. 791 (1909); *State ex rel. Thomas v. Superior Court,* 42 Wash. 521, 85 P. 256 (1906). Although the monorail station is not likely to take up the entire footprint of the property, the record indicates that the remaining portion of the property could be used for at least 10 years for construction and remediation of property in downtown Seattle. Report of Proceedings (RP) at 12. Additionally, unlike in *Convention Center,* whether any portion of the property will ever be sold or leased is not known. In contrast, in *Convention Center,* a private developer immediately took ownership of three floors of retail space. In this case, for the first 5-10 years, a substantial portion of the property will be put to public use and only after that time is there a possibility that the property may be sold. Furthermore, the record indicates that in other cities that have constructed public monorail transportation systems, surrounding land may need to be owned permanently by the condemning authority due to the particular traffic pattern of monorail stations.

¶ 47 HTK counters, however, that since SMP might sell or lease surplus property, if any, after the monorail is ***634** completed, the court is required to undertake a searching judicial review of the necessity of SMP's determination to condemn a fee interest in the property.[FN17] HTK points to no authority that requires a condemning authority to have a public use planned for property *forever.* Indeed, long standing Washington law is to the contrary. In *Reichling v. Covington Lumber Co.,* 57 Wash. 225, 106 P. 777 (1910), a property owner brought suit to enjoin logging activity on land that had been condemned earlier by the city of Seattle. Under the original condemnation, the city condemned a separate parcel of the property owner's land for purposes of its Cedar River water system. Nine years later, the city passed an ordinance whereby it granted a license to a private party to construct a logging road on the land. The

property owner brought suit to enjoin the private party from entering the land. The court noted, " ' [w]here a fee simple is taken, the weight of authority is that there is no reversion, but, when the particular use ceases, the property may, by authority of the state, be disposed of for either public or private uses.' " *Id.* at 228, 106 P. 777 (quoting John Lewis, A Treatise On The Law Of Eminent Domain § 596, at 765 (2d ed. 1888) and citing 2 John F. Dillon, Commentaries On The Law Of Municipal Corporations § 589, at 690 (4th ed. 1890)).

FN17. The dissent concedes that the Washington Constitution article I, section 16 contains the term "public use" and does not include the term "public necessity."

¶ 48 The court in *Reichling* also cited *Seattle Land & Improvement Co. v. City of Seattle,* 37 Wash. 274, 79 P. 780 (1905), finding that " '[w]here property is taken, ... with the intention of using it for a certain purpose specified in the ordinance authorizing the taking, as was done in this case, the city, doubtless, has the authority to change said contemplated use to another and entirely different use, whensoever the needs and requirements of the city suggest.' " *Reichling,* 57 Wash. at 228, 106 P. 777 (quoting 37 Wash. at 277, 79 P. 780).

¶ 49 Given long standing, well-settled case law in Washington, providing that decisions as to the type of property interest to be acquired are reviewed under the deferential ***635** legislative standard, we hold that SMP's determination to condemn a fee interest in HTK's property is a legislative question. FN18

FN18. The dissent criticizes the majority and claims that the majority is "blurring" the distinctions between the constitutionally mandated inquiry into whether the use is a "public use" and the judicial corollary determining whether the condemnation is "necessary." But, it is the dissent that blurs the distinction. The dissent agrees that this court employs a three-part test to determine whether a condemnation is constitutional. Yet, in derogation of its own statement of law, it conflates the third prong of the test-the necessity question-into the first prong of the test. The dissent would read the " public use" prong to make two inquiries: (1) is the use public and, if so, (2) is the government condemning more real property than is "needed." However, as discussed above, under long standing Washington case law including *Convention Center, Westlake, Humble Oil, Welcker, Hemenway,* and *Dickgieser,* these two inquiries are separate questions and are analyzed by this court under two different standards.
In a similar vein, the dissent cites *Humble Oil,* claiming that *Humble Oil* contains a " universal rule" which is separate from the three-prong test discussed above. The dissent is again mistaken. The dissent artfully fails to explain this court's holding in *Humble Oil,* that "manifest abuse of discretion was not found" with this court providing the same deference given to legislative questions of "necessity." *See also State ex rel. Tacoma Sch. Dist. No. 10 v. Stojack,* 53 Wash.2d 55, 330 P.2d 567 (1958) (dissent again fails to mention this court's deference to legislative determinations as to the selection of land " reasonably necessary" and that manifest abuse of discretion was not found).
Furthermore, the dissent fails to explain the context and holding of *Neitzel v. Spokane International Ry. Co.,* 65 Wash. 100, 117 P. 864 (1911). Unlike in this case and other cases cited by the majority above, *Neitzel* involved a determination years after the fact of whether a railroad had obtained a fee interest or an easement in property at a time when the extent of interests railroads could acquire in property was unclear.

****1178** *c. Whether a fee interest is reasonably necessary*

[19][20] ¶ 50 The next step is to determine whether the condemnation of a fee interest in the entire property is "necessary" for the public use. SMP correctly cites *Welcker,* 65 Wash.2d at 684, 399 P.2d 330, for the general rule that if a condemning authority has conducted its deliberations on an action "honestly, fairly, and upon due consideration" for facts and circumstances, that action will not be considered arbitrary and capricious, "even though there be room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached." Courts will consider costs of the project as a ***636** relevant factor. *See e.g., Port of Grays Harbor,* 30 Wash.App. 855, 638 P.2d 633; *Schultz,* 356 N.W.2d 846.[FN19]

FN19. The dissent concedes that this court has upheld various determinations of what constitutes necessity. "Necessity" requires only that the condemning authority show that the condemned property was " reasonably necessary" for the public use, not that it was absolutely necessary or indispensable. *See, e.g., Welcker,* 65 Wash.2d at 684, 399 P.2d 330 (the necessity requirement "embraces the right of the public to expect and demand the service and facilities to be provided by a proposed acquisition or improvement"; " [r]easonable necessity for use in a reasonable time is all that is required"). Thus, the property here is "reasonably necessary" for the public transportation project given that all of the property will be used initially for the construction of the monorail and a significant portion, and perhaps all, of the property will be used indefinitely for the monorail station and access to the station.

¶ 51 In this case, SMP determined that acquisition of the fee interest in property was reasonably necessary and required for the construction, operation, and maintenance of the monorail station on HTP's property and for related construction staging and development of the Green Line alignment in the vicinity of the station. SMP asserts that the SMP board of directors determined that this use was of an intensity and duration to justify the taking of the fee interest.

¶ 52 HTK points to a number of documents that indicate that SMP plans "Associated Development." Associated Development is defined by SMP to mean "a free standing project not connected to a station, built by a third party on land that SMP has fee ownership or some development rights and is most likely built after a station is built. The land can be sold outright or ground leased." CP at 358. HTK notes that SMP has specifically indicated that a portion of HTK's property might yield "surplus property," suitable for Associated Development. The record supports HTK's contention. At a community hearing about this monorail station, " SMP told the community that the residual property would be sold and it did not know yet how the property would be used." Resp't's Ex. 15. The revenue generated from possible transfers of " excess property" was included in SMP's earlier budgets. RP at 102. However, SMP noted in testimony that in a similarly situated property (in downtown Vancouver), the entire footprint outside that monorail ***637** station was ****1179** used as a park and not developed separately due to the ongoing need for access. RP at 101.

¶ 53 Amicus cite the case *City of Cincinnati v. Vester,* 33 F.2d 242 (6th Cir.1929), in part for the proposition that excess condemnation, taking more land than is necessary, in order to help recoup the cost of public projects is impermissible. In *Vester,* the city condemned property to widen a street by 25 feet. The city condemned land within that strip of land and attempted to condemn land outside of the 25-foot strip. The city was prohibited from condemning the excess property. The Sixth Circuit held that the property was only taken in order to sell it (for a private use) at a later date in order to capture the increased value that the widened street would bring. *Id.* [FN20]

FN20. The United States Supreme Court affirmed, on narrower grounds. *City of Cincinnati v. Vester,* 281 U.S. 439, 50

S.Ct. 360, 74 L.Ed. 950 (1930) (concluding that the proceedings for excess condemnation of the properties involved in the suits were not taken in conformity with the applicable law of the state and affirming the decrees below upon that ground.)

¶ 54 SMP argues that *Vester,* 33 F.2d 242, is distinguishable since the city had no public use at all for the property except for possible recoupment. In contrast, in this case, SMP is only condemning property that it has determined is necessary for public use. SMP contends that the evidence demonstrates that the entire property will be used for the construction, maintenance, and operation of the monorail station and the construction staging. Moreover, the proposed station designs include plans encompassing the entire parcel. Given the cost of this undisputed present need of indefinite length and the permanent need for at least a significant portion of the property, SMP contends that the SMP board justifiably determined that the cost of the construction easement could easily eclipse the cost of a fee interest. Testimony as to fair market value of construction easements was undisputed at the hearing. Furthermore, SMP contends that a condemning body may consider financial implications when determining what interests are necessary to condemn, citing *Convention Center.*

***638** ¶ 55 The record supports SMP's contentions that it needs all of the property for a substantial period of time to build and construct a monorail station and may need all of it indefinitely. It is significant that testimony was undisputed that the cost of the temporary construction easement combined with likely cost of damages due to a ground lessee could eclipse the cost of a fee interest. Given the absence of actual or constructive fraud, we hold that SMP's determination to condemn a fee interest in the entire property was necessary to the public use of public transportation.[FN21]

FN21. The dissent erroneously claims that SMP has engaged in arbitrary and capricious conduct. First, as discussed above, an action taken by a municipality after proper procedural consideration is not arbitrary or capricious, even though a reviewing court may believe it is erroneous. *See Welcker,* 65 Wash.2d at 684, 399 P.2d 330. In this case, HTK is not alleging that SMP's decision-making process was improper. Second, the dissent's reliance on *Port of Everett v. Everett Improvement Co.,* 124 Wash. 486, 214 P. 1064 (1923) is misplaced. Unlike the condemning authority in that case in which there was no plan for any type of current or future construction or improvement, SMP has developed a plan for using the entire property-building the monorail. Moreover, nothing in *Everett Improvement* requires this court to find that the failure to have in place a definitive use plan for the entire life of the property makes the condemning authority's actions arbitrary and capricious. Second, the fact that SMP may sell or lease a part of the condemned property at some future point does not show an unconstitutional improper motive. As discussed above, in *Convention Center,* this court upheld the condemning entity's agreement, up front, to sell three of the four floors of the convention center to private commercial interests. Here, there is no agreement for sale and, in contrast, there is an immediate use of the entire property for construction, staging, alignment, and future operation of a monorail station.

ATTORNEY FEES

[21] ¶ 56 HTK requests attorney fees. RCW 8.25.075(1) provides that a superior court having jurisdiction of a proceeding instituted by a condemnor to acquire real property shall award the condemnee costs including reasonable attorney fees and reasonable expert witness fees if there is a " final adjudication that the condemnor cannot acquire the real property by condemnation." Because we conclude that SMP, the condemnor, can **1180 acquire the property, HTK, the condemnee,

is properly denied attorney fees.

*639 CONCLUSION

¶ 57 Consistent with our case law and public policy, courts ensure that property condemned is put to a public use, and the legislature/local governments ensure that such projects are developed in a cost effective manner. This division provides deference to local governments to determine what property is necessary to implement projects that a court has determined are for a public use. This court is both preserving important property ownership rights and ensuring that when a municipal authority condemns property for a public project, such project is truly for the "public use" within the meaning of the Washington State Constitution. Unlike in the recent United States Supreme Court case, *Kelo,* this case involves one of the most fundamental public uses for which property can be condemned-public transportation. Accordingly, the trial court's finding of public use and necessity is affirmed.

ALEXANDER, C.J., C. JOHNSON, BRIDGE, OWENS and FAIRHURST, JJ., concur.
CHAMBERS, J., concurs in result only.
J.M. JOHNSON, J. (dissenting).
¶ 58 In a recent and highly publicized opinion, the United States Supreme Court justified its denial of federal constitutional protections against eminent domain abuse by acknowledging the states' power to afford their citizens greater protection against such abuse.
[N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.

Kelo v. City of New London, --- U.S. ----, 125 S.Ct. 2655, 2668, 162 L.Ed.2d 439 (2005) (footnote omitted).

*640 ¶ 59 In the wake of *Kelo,* legal scholars and citizens exulted that Washingtonians were insulated from such abuses because the plain language of the Washington Constitution, as previously enforced by this court, afforded broader protection against eminent domain abuse than its federal counterpart. *See* Const. art. I, § 16. Unfortunately, the majority of this court is less enlightened than the citizenry or less inclined to restrain public agencies in their taking of private property. I side with the citizens and our Washington Constitution. I therefore dissent.

I. FACTS

¶ 60 Special protection against taking of private property is found in our constitution's article I, section 16 "Declaration of Rights." These protections were enacted to protect citizens from abuse of government powers. The settlers of Washington came here drawn by the opportunity to own their own property and many fled from abusive governments. In this case, we have a good example.

¶ 61 In 1941 an immigrant railroad laborer, Henry T. Kubota, purchased the Seattle Hotel that was situated on real property in Seattle's Pioneer Square, the subject of the present litigation.[FN1] In the wake of Pearl Harbor, and pursuant to President Franklin D. Roosevelt's Executive Order 9066, 7 Fed.Reg. 1407 (Feb. 25, 1942), Kubota was displaced to a Japanese-American internment camp. *See generally Toyosaburo Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (upholding constitutionality of military order implementing Executive Order 9066). Although many internees lost all their possessions during this period, a loyal friend managed Kubota's property, returning it to him after his release.

FN1. The parcel in question is located in historic Pioneer Square and is triangular in shape. *See* Pet'rs' Ex. 2, at 5. It is bordered by 2nd Avenue, James Street, and Yesler Way. *Id.*

¶ 62 The Seattle Hotel suffered extensive damage during the earthquake of 1949. Despite Kubota's repairs, the ***641** hotel's useful life ****1181** had been exhausted by 1960, and it was demolished. Kubota then entered into a long-term lease that proposed the construction of a six-story office building atop a parking garage. To Kubota's disappointment, only the parking garage was constructed, which is now commonly referred to as the Sinking Ship garage. Kubota retained the long-term dream of a larger development. Since Kubota's death in 1989, his descendents have managed the property under his namesake, HTK Management, L.L.C. (HTK).

¶ 63 In 2002, the predecessor of the Seattle Monorail Project [FN2] (hereinafter Monorail) identified the Sinking Ship parcel as a potential monorail station site. HTK learned this information from a local newspaper rather than being contacted directly by the agency.

FN2. The Elevated Transportation Company is the predecessor of Monorail. *See* City of Seattle Proposition No. 2 (Initiative 53: The Monorail). Although Monorail operates entirely within the City of Seattle, the agency is an independent municipal corporation. *See* majority at 1171; RCW 35.95A.020.

¶ 64 Shortly thereafter, HTK expressed its willingness to collaborate with Monorail so that both parties could implement their visions for the parcel-Monorail's station on a fraction of the block, coupled with HTK's redevelopment of the remainder of the parcel. The parties began planning for this complementary development. It appears HTK was more sincere than Monorail, and the agency plans took a different direction.

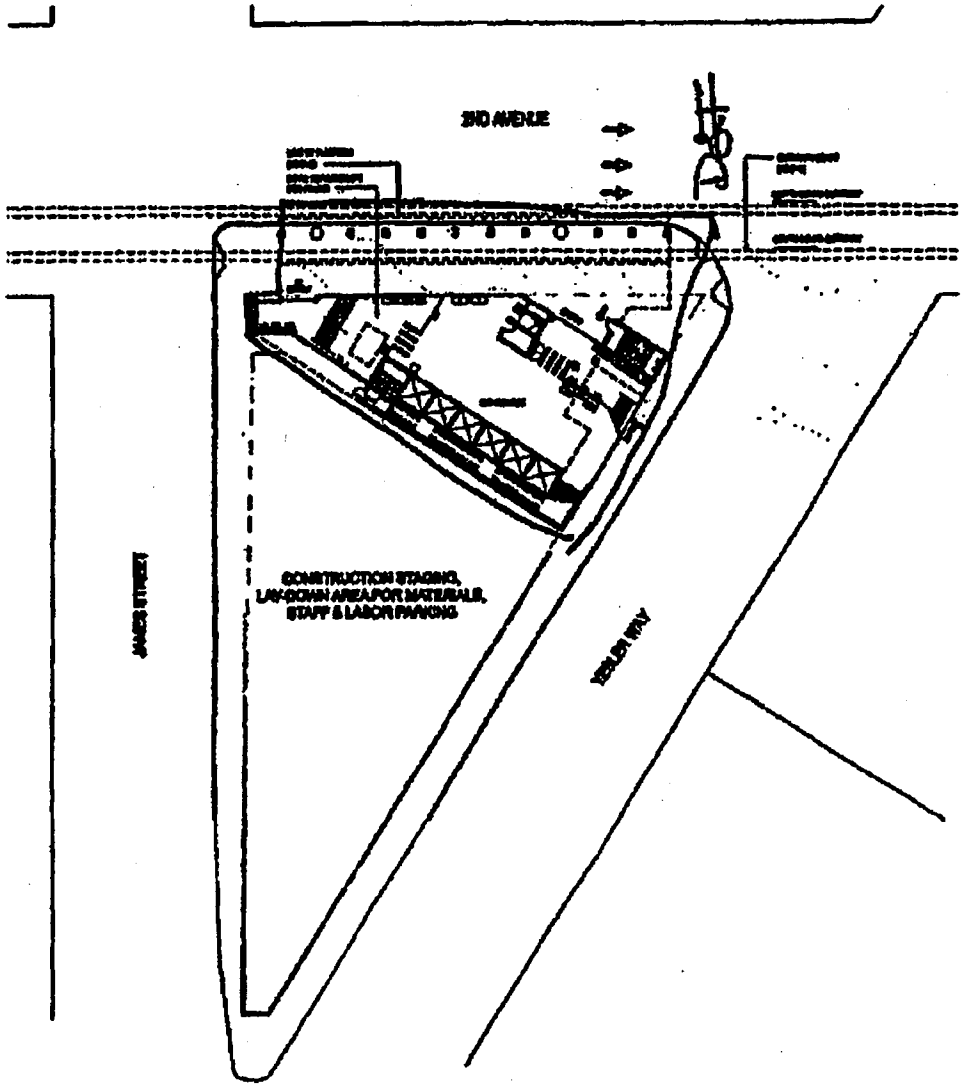
¶ 65 On April 7, 2004, Monorail passed Resolution 04-16 to acquire the entire Sinking Ship parcel by condemnation. Resp't's Ex. 13, at 8. Three weeks later, on April 28, 2004, Monorail filed a petition against HTK for condemnation in King County Superior Court, seeking a fee interest in the entirety of the parcel. Clerk's Papers (CP) at 3.

¶ 66 On August 13, 2004, HTK filed a motion to dismiss the condemnation action for lack of subject matter jurisdiction on the grounds that Monorail's enabling legislation failed to prescribe the agency's condemnation procedure. CP at 41. The trial court denied both HTK's motion and a ***642** subsequent motion for reconsideration. CP at 199-202, 215-16.

¶ 67 On September 13, 2004, the trial court held a hearing on public use and necessity in which Monorail sought to justify its condemnation of the entire parcel. Monorail conceded that the station footprint would occupy only approximately one-quarter to one-third of the parcel.[FN3] The following diagram is typical of the preliminary designs entered into evidence:

FN3. The majority's fact section states that "preliminary designs show the station footprint covering the entire property, other more recent designs show a smaller footprint." Majority at 1170. Although technically correct, this statement is misleading. The former are unquestionably no longer under any serious consideration. *See* Br. of Resp't at 7 n.13 ("depending on the ultimate station design, approximately 6,500 to 10,000 square feet of the approximately 20,000 square foot parcel will be covered by the station footprint."). *See also* Report of Proceedings (RP) at 54 ("THE COURT: The bottom line is the footprint of the Yesler station is not going to take the entire triangle of the Yesler property? THE WITNESS: That's correct.").

****1182**



***643** ¶ 68 Monorail asserted that condemnation of the parcel outside the footprint of the monorail station (remainder property) was needed for construction staging and staff parking activities. Thus, Monorail argued that these purposes of its condemnation constituted a public use.

¶ 69 HTK conceded that both the station and construction staging may be public uses. However, they countered that because construction staging and parking [FN4] is inherently temporary, Monorail was not justified in condemning a fee interest in the remainder property. Accordingly, HTK urged the court to grant Monorail a fee interest in the station footprint and at most a construction easement on the

remainder property.

FN4. This is temporary parking and not long-term parking for monorail patrons. *See* "staff and labor parking" on preceding diagram. There will be substantially less parking than the present public garage.

¶ 70 At the hearing, HTK presented evidence to demonstrate that Monorail sought to condemn more property than necessary in order to profit from the increased value of the parcel after monorail construction. The concept of agency profit from such land transactions was discussed by Monorail from its very inception. The petition creating the monorail noted:
Rights of Way: Market value paid on the limited number of properties that must be acquired, some easements to be purchased, ****1183** and *high-value properties resold when construction is completed.*

Resp't's Ex. 20, at 44 (emphasis added).

¶ 71 Monorail subsequently adopted an internal development policy that anticipated selling " remainder property" to private developers. Referred to as "associated development," Monorail defines it as:
a free standing project not connected to a station, built by a third party on land that SMP has fee ownership or some development rights and is most likely built after a station is built. The land can be sold outright or ground leased.

***644** Resp't's Ex. 12, at 1. After adopting this " associated development" policy, Monorail even sought out "site specific recommendations for [associated] types of development opportunities." *Id.*

¶ 72 Monorail also emphasized its "associated development" policy in the Design-Build-Equip Contract-the contract to be awarded to the winning bidder for construction of the monorail.[FN5]

FN5. There was actually only one bidder.

The SMP has and will be acquiring property for Stations and is *interested in maximizing the development potential* of such properties. In some instances, the SMP will be required to acquire a complete site and may, once the Station is complete, *sell or lease a portion of the site to private parties who would develop this excess property for commercial use.* This type of development is referred to as "Associated Development."
Resp't's Ex. 26, at DBEC-222 (emphasis added).

¶ 73 In addition to these monorail policies, HTK provided specific evidence that Monorail planned " associated development" for this Sinking Ship parcel. The Transit Way Agreement [FN6] planned for "[a]ssociated development of the unused portion of the parcel bounded by 2nd Avenue, James Street and Yestler Way (a.k.a., 'Sinking Ship Garage.')." Ex. C (Resp't's Ex. 23), at 4. The agreement set " associated development" for the Sinking Ship parcel as a "priority." *Id.* Moreover, at a Pioneer Square community meeting, the "SMP told the community that the residual property would be sold and it did not know yet how the property would be used." Resp't's Ex. 15.

FN6. The Transit Way Agreement between the City of Seattle and Monorail establishes conditions under which Monorail may use the city's rights-of-way.

¶ 74 To this evidence Monorail responded that it had no definitive postconstruction plans for the remainder property and that absent a demonstration of fraud or bad faith, the agency was entitled to condemn the parcel in its entirety. The trial court entered a judgment of public use and necessity. HTK now appeals.

***645** II. ANALYSIS

A. *Procedures for Condemnation*

¶ 75 Petitioners first assert that the trial court lacked jurisdiction over this matter because Monorail's enabling act fails to expressly prescribe

the procedures by which the agency exercises its eminent domain authority. *See State ex rel. Mower v. Superior Court,* 43 Wash.2d 123, 260 P.2d 355 (1953). With respect to this argument, however, I reluctantly conclude with the majority that lack of such procedures did not deprive the trial court of jurisdiction.

¶ 76 The statute does specify that Monorail could " acquire by ... condemnation." RCW 35.95A.050(1) [FN7]. Our case law establishes that condemnation procedures may be fairly implied if necessary to effectuate the Legislature's intent. *See In re Pet. of Seattle,* 96 Wash.2d 616, 629, 638 P.2d 549 (1981) (*Westlake*). In addition, the differences between procedural statutes are largely inconsequential and " embrace the same procedural theory, namely ... the entry of three separate and distinct judgments during the course of a proceeding." *Pub. Util. Dist. No. 1 v. Wash. Water Power Co.,* 43 Wash.2d 639, 641, 262 P.2d 976 (1953). The determination that Monorail's condemnation procedures may be fairly implied from an express grant of authority does not address the scope of the ****1184** condemnation authority. This is a constitutional issue that I believe is determinative here.

FN7. Fully quoted *infra* p. 1184.

B. *Scope of Condemnation Authority*

¶ 77 Municipal corporations do not possess an inherent power of eminent domain and thus may exercise such power only when expressly authorized to do so by the state legislature. *See, e.g., State ex rel. Tacoma Sch. Dist. No. 10 v. Stojack,* 53 Wash.2d 55, 60, 330 P.2d 567 (1958). Statutes conferring such power are in derogation of the common right, ***646***State ex rel. King County v. Superior Court,* 33 Wash.2d 76, 82, 204 P.2d 514 (1949), and "must be strictly construed, both as to the extent of the power and as to the manner of its exercise." [FN8] *State ex rel. Postal Tel.-Cable Co. v. Superior Court,* 64 Wash. 189, 193, 116 P. 855 (1911).

FN8. All delegations of state authority are to be construed strictly, and this is " ' especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other.' " *State ex rel. Chesterley v. Superior Court,* 19 Wash.2d 791, 800, 144 P.2d 916 (1944) (quoting John Lewis, 1 A Treatise On The Law Of Eminent Domain In The United States § 388, at 708 (3d ed.1909)).

¶ 78 Monorail is a special purpose district that performs a single, narrowly circumscribed function: construction and operation of a monorail.[FN9] The extent of Monorail's condemnation powers are set forth in RCW 35.95A.050(1), which authorizes city transportation authorities:

FN9. The majority suggests, for example, that the agency could create a park out of the excess Sinking Ship property. However, under our cases, construction of a park likely exceeds Monorail's enabling legislation.

To acquire by purchase, condemnation, gift, or grant and to lease, construct, add to, improve, replace, repair, maintain, operate, and regulate the use of public monorail transportation facilities, including passenger terminal and parking facilities and properties, and other facilities and properties as may be necessary for passenger and vehicular access to and from public monorail transportation facilities, together with all lands, rights of way, and property within or outside the authority area, and together with equipment and accessories necessary or appropriate for these facilities ....

RCW 35.95A.050(1). Although Monorail is entitled to acquire property by "condemnation," the purposes of the condemnation must be for the purpose of "public monorail transportation facilities. " In addition, any condemnation must not violate our constitutional prohibition against the taking of private property for private purposes.

Private property shall not be taken for private use .... No private property shall be taken or damaged for public or private use without just compensation having been first made .... *Whenever an attempt is*

made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and ***647** *determined as such, without regard to any legislative assertion that the use is public.*

Const. art. I, § 16.

¶ 79 To determine whether the use of the eminent domain power is allowed by our constitution, we employ a three-part test:
(1) that the use is really public,
(2) that the public interests require it, and
(3) that the property appropriated is necessary for the purpose.

Westlake, 96 Wash.2d at 625, 638 P.2d 549 (quoting *King County v. Theilman,* 59 Wash.2d 586, 593, 369 P.2d 503 (1962)). *See also State ex rel. Wash. State Convention & Trade Ctr. v. Evans,* 136 Wash.2d 811, 817, 966 P.2d 1252 (1998) (*Convention Center*).

¶ 80 As we are dealing with constitutional rights of the legal owner, the burden of proof is on the condemning agency, not on the condemnee, to demonstrate that the condemnation is for a public use and that it is necessary for that public use. *Convention Ctr.,* 136 Wash.2d at 822-23, 966 P.2d 1252; *Theilman,* 59 Wash.2d 586, 369 P.2d 503; *State ex rel. Sternoff v. Superior Court,* 52 Wash.2d 282, 325 P.2d 300 (1958).

¶ 81 As the majority correctly states, the determination that a condemnation is for a ****1185** public use is not the same thing as public necessity. *See, e.g., Theilman,* 59 Wash.2d at 594, 369 P.2d 503 (" 'Public use' and 'necessity' cannot be separated with scalpellic precision, for the first is sufficiently broad to include an element of the latter. "). In article I, section 16 our state constitution directly addresses only the "public use" inquiry. *See State ex rel. Puget Sound Power & Light Co. v. Superior Court,* 133 Wash. 308, 311, 233 P. 651 (1925). The remaining two inquiries regarding public interest and necessity are judicial corollaries to enforce the constitutional mandate. Unfortunately, the majority errs by greatly blurring the distinctions between the constitutionally mandated inquiry into public use and the judicial corollary of necessity. There are two inquiries: Is this property necessary for the public purpose? Is *all* this property necessary for the public purpose? Here, the wrong answer to the latter ***648** inquiry is given, and a violation of constitutional rights results.

C. *Public Use*

¶ 82 As previously stated, the inquiry into public use is constitutional in nature. As an initial matter, the majority states that a legislative declaration of public use is "entitled to great weight." Majority at 1175 (citing *Hemenway,* 73 Wash.2d 130, 437 P.2d 171). It is stupefying that the majority claims that we must give "great weight" to such determinations when our constitution mandates that this "*shall* be a judicial question, and determined as such, *without regard to any legislative assertion* that the use is public." Const. art. I, § 16.

¶ 83 Use of the word "shall" is imperative and operates to create a duty rather than to confer discretion. *See, e.g., Crown Cascade, Inc. v. O'Neal,* 100 Wash.2d 256, 668 P.2d 585 (1983). Moreover, "regard" is defined as "to look at," " show respect or consideration for," "to take into consideration or account," or "to pay attention." Webster's Third New International Dictionary 1911 (2002).

¶ 84 Thus, when our constitution states that the courts *must* make this determination "without regard to any agency's legislative assertion," it means that we must not show deference to the legislative assertion of public use; we decide the question independently. The plain language of our constitution does not require any deference and in fact mandates exactly the opposite. To the extent that this assertion by the majority is based on erroneous jurisprudence, it defies the plain language of our constitution and should be overruled. Not surprisingly, more persuasive case law also supports the contrary conclusion, that the question is judicial. FN10

FN10. We have stated on numerous

> occasions that "[s]tate cases and statutes from the time of the constitution's ratification, rather than recent case law, are more persuasive in determining" the protections of a constitutional provision. *Ino Ino, Inc. v. City of Bellevue,* 132 Wash.2d 103, 120, 937 P.2d 154 (1997). Our early jurisprudence demonstrates that legislative determinations of public use are not entitled to great weight. *See, e.g., Decker v. State,* 188 Wash. 222, 227, 62 P.2d 35 (1936) ("[W]hether the use be ' really public' is for the courts to determine, and in the determination of that question they will 'look to the substance rather than the form, to the end rather than to the means.' " (quoting *State ex rel. Puget Sound Power & Light Co. v. Superior Court,* 133 Wash. 308, 233 P. 651 (1925))); *State ex rel. Andersen v. Superior Court,* 119 Wash. 406, 410, 205 P. 1051 (1922) ("The legislature can declare in the first instance that the purpose is a public one, and it remains the duty of the court to disregard such assertion if the court finds it to be unfounded."); *Langdon v. City of Walla Walla,* 112 Wash. 446, 456, 193 P. 1 (1920) ("We shall assume that the question of public use is a judicial question in Oregon, as it is in our state, and that such question has been and will be decided by the courts of that state ...."); *Healy Lumber Co. v. Morris,* 33 Wash. 490, 501, 74 P. 681 (1903) ("Under such circumstances the case comes to the court without any presumption one way or the other on the subject of public use, but is to be tried by the court like any other question that is submitted to its discretion.").

***649** ¶ 85 Although we have not settled onto one single definition of public use, we have always indicated it means more than mere beneficial use. *Westlake,* 96 Wash.2d at 627, 638 P.2d 549. In *Convention Center,* we explained the constitutional test for adjudicating public use.

Article I, section 16 prohibits the taking of private property for private use. Thus, *this court must ensure that the entire parcel subject to the eminent domain proceedings will be employed by the public use. **1186 The relevant inquiry is whether the government seeks to condemn any more property than would be necessary* [FN11] *to accomplish the purely the public component of the project.* If the anticipated public use alone would require taking no less property than the government seeks to condemn, then the condemnation is for the purpose of a public use and any private use is incidental.

> FN11. The use of the term "necessary" is unfortunate because it is also a term of art in eminent domain jurisprudence. However, there can be no equivocation that this analysis in *Convention Center* was regarding public use and not necessity. This analysis was completed specifically under the header of "public use" and was later followed by a separate section on " necessity."

Convention Ctr., 136 Wash.2d at 822, 966 P.2d 1252 (emphasis added). In other words, our constitutionally mandated public use inquiry seeks to determine whether the government is condemning any more real property than needed for the project.

¶ 86 The rule as articulated in *Convention Center* has deep roots in our eminent domain jurisprudence. For example, in *Stojack,* 53 Wash.2d at 63-64, 330 P.2d 567, we stated that:

***650** [p]ublic education is a public use for which private property may be appropriated under the power of eminent domain. If an attempt is made to take more property than is reasonably necessary to accomplish the purpose, then the taking of excess property *is no longer a public use,* and a certificate of public use and necessity must be denied.

Accord 9 Nichols On Eminent Domain § 32.05 (3d ed.2005); *City of Pullman v. Glover,* 73 Wash.2d 592, 595, 439 P.2d 975 (1968) ("[T]he extent of the taking may be no greater than is reasonably necessary for the stated public purpose.").

¶ 87 This same rule has also been reiterated with respect to the interest to be acquired.
When a legislature delegates to any subordinate agency, *such as a municipality* or a public service corporation, the right and authority to exercise the power of eminent domain, it ordinarily defines the estate or interest to be appropriated, having power to authorize the taking of a complete fee simple title, a qualified fee, or an easement only. When it has prescribed by statute the extent of interest to be vested, none further can be taken. *Courts in construing statutes which grant the power, and authorize the taking of a certain estate or interest, enforce the rule of strict construction, permitting no greater title or interest to vest than has been expressly authorized or may be necessary to the contemplated public use. When an easement will be sufficient, no intendment or rule of liberal construction will be indulged to support an attempt to obtain any greater interest or estate.*

Neitzel v. Spokane Int'l Ry. Co., 65 Wash. 100, 105, 117 P. 864 (1911) (emphasis added). We have also stated the rule as follows:"Inasmuch as property cannot constitutionally be taken by eminent domain except for the public use, *it follows that no more property shall be taken than the public use requires; and this rule applies both to the amount of property and the estate or interest in such property to be acquired by the public. If an easement will satisfy the requirements of the public, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which should not be obliged to pay more than it needs.*"

***651** *City of Seattle v. Faussett,* 123 Wash. 613, 618, 212 P. 1085 (1923) (emphasis added) (quoting 10 Ruling Case Law 88). *Accord State v. Larson,* 54 Wash.2d 86, 89, 338 P.2d 135 (1959) ("no greater estate or interest should be taken than is reasonably necessary to accomplish the public use or necessity."); *State ex rel. Eastvold v. Superior Court,* 48 Wash.2d 417, 294 P.2d 418 (1956).

¶ 88 The above case law is unequivocally clear: if a government entity seeks to condemn more property than is needed, the excess property is not for a public use and may not be lawfully condemned. This rule is so well engrained that we have called it a "universal rule." *City of Tacoma v. Humble Oil & Ref. Co.,* 57 Wash.2d 257, 356 P.2d 586 (1960).

****1187** ¶ 89 Unfortunately, the majority disregards this "universal rule" of our eminent domain jurisprudence. The majority correctly states that a legislature's grant of eminent domain power to a municipality is to be strictly construed but immediately backpedals to avoid construing that authority so strictly as to actually restrict the agency. Majority at 1171. The majority cannot show that following our "universal rule" here, by allowing Monorail to condemn only the property interests necessary to accomplish its purposes (a fee in the station footprint and, at most, construction easement in the remainder), would "defeat the purpose of the legislative grant." The contrary conclusion is further supported by the fact that other monorail station sites do not require an entire block for "staging and staff and labor parking."

¶ 90 More importantly, however, the majority would destroy our "universal rule" by stating that " decisions as to the amount of property to be condemned are legislative questions, reviewed under the legislative standard of necessity." [FN12] Majority at 1176-77. It finally concludes that declarations of necessity by a condemning agency are conclusive ***652** absent fraud or arbitrary and capricious conduct. This is abdication of the court's constitutional duty.

FN12. Remarkably, the majority does this after attempting to distinguish *Convention Ctr.,* 136 Wash.2d 811, 966 P.2d 1252. As previously quoted, *Convention Center* held the correct test for inquiries into public use: "[T]his court must ensure that the entire parcel subject to the eminent domain proceedings will be employed by the public use. The relevant inquiry is whether the government seeks to condemn any more property than would be necessary to accomplish purely the public component of the project." *Convention Ctr.,* 136 Wash.2d at 822, 966 P.2d 1252.

> The majority attempts to distinguish *Convention Center* by observing that it dealt with alleged permanent public use within the footprint of the project. The majority cannot explain, however, why these observations change our "universal rule" that determining whether excess property has been condemned is analyzed under a constitutionally mandated inquiry into public use, and not the deferential judicial construct of necessity.

¶ 91 If, as the majority suggests, decisions as to the extent of property to be condemned fall under necessity, and judicial review is properly characterized by deference, there are no effective means by which the courts may carry out the constitutionally mandated independent inquiry into public use. If the majority seeks to overrule our " universal rule," it should do so explicitly.

¶ 92 Moreover, precedential support for the majority's conclusion is lacking. Specifically, the majority's reliance on *Humble Oil* and *In re Port of Grays Harbor,* 30 Wash.App. 855, 638 P.2d 633 (1982), for the proposition that decisions as to the amount of property to be condemned as legislative questions, reviewed under the deferential standard are misplaced. Nor are these cases controlling as the majority suggests.

¶ 93 In *Humble Oil,* 57 Wash.2d at 257, 356 P.2d 586, the city of Tacoma developed a hydroelectric project on the Cowlitz River in order to meet the city's electricity needs. Because the reservoir behind the dam would inundate the condemnee's land, the city sought to condemn a fee interest in the portion to be inundated. Although the condemnee stipulated that the hydroelectric project was a public use, he argued that he should be able to retain the mineral rights under the inundated land. In contrast, the city argued for a fee simple on the grounds that without a fee it could not "operate and control the reservoir satisfactorily," including concerns over pollution, subsidence, loss of fish life, among others. *Id.* at 259, 356 P.2d 586. The court granted an order of public use and necessity.
The reason that the court determined that it ***653** would not interfere with the "selection" of land was precisely because doing so would interfere with the very purpose of the project, by creating pollution, etc. The same cannot be said for the instant case.

¶ 94 The majority also relies on *Port of Grays Harbor.* Not only is *Port of Grays Harbor* a Court of Appeals case that is not binding on this court, the case doesn't even purport to construe article I, section 16 of our state constitution. Rather, it interprets article VIII, section 8, which is a separate broad constitutional grant of condemnation authority only to *port* districts. That grant is so broad that the condemnation of property for industrial development and trade, normally understood as private uses, is often ****1188** argued to be public use when part of a port development.

¶ 95 Because *Humble Oil* and *Port of Grays Harbor* offer insufficient support for their proposition, the majority relies on case law from various other states to support its claim that the condemning authority's decision as to the extent of the property interest is a legislative question. Majority at 1176. It appears that the majority is not interested in *our* Washington Constitution but would rather cite to cases from other states that support its conclusion, even though those states have *different* constitutional provisions.

¶ 96 Because Washington Constitution article I, section 16 is clearly unique, we have previously refused to apply case law from other states to interpret it. *See Westlake,* 96 Wash.2d at 627, 638 P.2d 549 (rejecting the use of cases from other jurisdictions to interpret article I, section 16 because such cases "are not helpful."). The plain language of our constitution was chosen by our settler forefathers to provide one of the strongest mandates against the taking of private property for private use in the nation.
The judicial determination clause in the Washington Constitution is a clause currently existing in only four other states.[FN13] At the time of the 1889 Washington Convention, only Colorado ***654** and Missouri had similar provisions. It is not entirely clear why such a provision was included in Washington's only constitutional restriction on the sovereign's otherwise limitless eminent domain power .... The only motion relative to this provision

in the convention was an attempt to strike out any reference to the legislature. It failed. However, the clear language of the provision, with its difference from most other constitutions and early cases, shows that the constitutional framers sought to place a limit on the legislature by assigning the judiciary the duty to determine the character of proposed public uses.

> FN13. Ariz. Const. art. II, § 17 (" Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.").
> Colo. Const. art. II, § 15 ("[W]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."). *See also Pub. Serv. Co. of Colo. v. City of Loveland,* 79 Colo. 216, 245 P. 493 (1926).
> Miss. Const. art. III, § 17 ("[W]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.").
> Mo. Const. art. I, § 28 ("[W]hen an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.").

James M. Dolliver, *Condemnation, Credit, and Corporations in Washington: 100 Years of Judicial Decisions-Have the Framers' Views Been Followed?,* 12 U. Puget Sound L.Rev. 163, 175-76 (1989) (footnotes omitted).

¶ 97 The majority cites *Reichling v. Covington Lumber Co.,* 57 Wash. 225, 106 P. 777 (1910) for the proposition that an immediate public use, even if only temporary, justifies the condemnation of a fee. However, in *Reichling,* the property had already been condemned years prior to the action, and the real issue was whether collateral attack on the condemnation was proper. In *Reichling,* as in all other cases addressing this matter, the use intended was not inherently temporary and at least had the potential to be of indefinite duration. Here, construction use is clearly, and admittedly, temporary.

***655** ¶ 98 Finally, the majority also reasons that Monorail was entitled to take a fee in the remainder property because it determined that it would be less expensive to do so. However, the amount that property costs does not determine whether it is a public use. *Cf. Westlake,* 96 Wash.2d at 627, 638 P.2d 549 ("A beneficial use is not necessarily a public use."). Moreover, no actual cost figures were given, and this opinion was ****1189** lay testimony-neither qualified nor admitted as expert opinion.

¶ 99 Our "universal rule" states that when a government agency seeks to condemn more property than required for legitimate public purpose, the excess is not for a public use. Here, not only does Monorail have an "associated development" policy that encourages excess condemnation for subsequent resale for private use at a profit, but the agency has made such condemnation a "priority" for the Sinking Ship parcel. Monorail's sole justification for condemning a fee in this portion of the parcel is the inherently temporary use of construction staging and staff and labor parking. The real purpose is to profit from the later sale.[FN14]

> FN14. Providing Monorail staff free parking in Pioneer Square is unlikely to be a public use.

¶ 100 The majority cannot point to a single case approving the condemnation of a fee interest for an inherently temporary use where the condemning

agency has a policy of condemning excess property for subsequent resale for private use. The proposition is most reminiscent of *Westlake,* in which this court disapproved such a condemnation proposal.

¶ 101 I would hold that under article I, section 16, anything beyond a fee simple in the footprint of the monorail station is not a public use. The constitution of our forefathers and Kubota's legacy requires this conclusion. The order of public use and necessity should be reversed on this basis alone.

***656** D. *Necessity for this public use*

¶ 102 Even assuming that Monorail had proved a public use in the entirety of the parcel, it still cannot prove necessity. The majority's analysis regarding necessity is as flawed as its public use analysis.

¶ 103 Unlike the inquiry into "public use," which is a constitutional mandated inquiry, the inquiry into necessity is a corollary judicial construct. As stated by the majority, several determinations of necessity have been upheld absent actual fraud. Majority at 1175. Yet, the majority fails to note other grounds upon which we overturn findings of necessity. Besides fraud, a declaration of necessity is not upheld where there is arbitrary or capricious conduct, manifest abuse of discretion, violation of law, improper motives, or collusion. *Stojack,* 53 Wash.2d 55, 330 P.2d 567. Here, I would hold that the record establishes that Monorail's action is arbitrary and capricious and based upon improper motives.

¶ 104 Arbitrary and capricious conduct is defined as " "willful and unreasoning [action] and taken without regard to the attending facts or circumstances." " *Wash. Indep. Tel. Ass'n v. Wash. Utils. Transp. Comm'n,* 149 Wash.2d 17, 26, 65 P.3d 319 (2003) (quoting *Rios v. Dep't of Labor Indus.,* 145 Wash.2d 483, 501, 39 P.3d 961 (2002) (quoting *Hillis v. Dep't of Ecology,* 131 Wash.2d 373, 383, 932 P.2d 139 (1997))). Monorail has unquestionably engaged in arbitrary and capricious conduct as evidenced by the fact that it seeks to condemn the Sinking Ship property before it has even finalized plans for the station and where the agency has admitted that the station footprint will use only one-quarter to one-third of the parcel. *See supra* note 3.

¶ 105 In *Port of Everett v. Everett Improvement Co.,* 124 Wash. 486, 214 P. 1064 (1923), the newly formed Port of Everett sought to condemn property to carry out its purposes but had not formed any definitive plans for property to be condemned. The enabling statute of the port stated that it could condemn only property "necessary for the purposes of the port district." The court reasoned that:
***657** where the grant is of power to acquire only necessary property, there must be a showing that the particular property sought to be acquired is thus necessary, and without some definite stated plan of improvement, this necessity cannot be shown. So here, *since there is no such definite plan, it is impossible for the court or anyone to know whether all or what particular part of the property here sought to be condemned is necessary for the use of the port district, and the right of condemnation must fail for this reason.*

Everett Improvement, 124 Wash. at 494, 214 P. 1064 (emphasis added).

****1190** ¶ 106 Here, Monorail argued that there "is no requirement that a condemning authority must have a final design demonstrating use of the entire site before a condemnation can proceed forward." Br. of Resp't at 37. Monorail's argument is answered by *Everett Improvement.*

¶ 107 Like the *Everett Improvement,* the monorail enabling legislation authorizes the agency to condemn only that property which is "necessary or appropriate for [its] facilities." RCW 35.95A.050(1). Monorail repeated numerous times at the public use hearing that it had no definitive plans for the entirety of the Sinking Ship parcel except for the inherently temporary purpose of construction.[FN15]

FN15. *See, e.g.,* RP at 22 ("We haven't done any planning."); RP at 23 ("There has been no determination at all in our

> minds at this point .... There are no plans for development on this site."); RP at 77 ("I think the way I would word that is that we are trying to leave our options open...."); RP at 78 ("We have no intention at this time of doing anything with the property specific .... One of the possibilities could be access, one could be a park, one could possibly be selling off residuals sometime in the future."); RP at 122 ("At the moment no uses appear to me if there is a remainder, what our use of that would be").

¶ 108 By allowing premature condemnation of the remainder property, the majority implicitly approves the practice of an agency maintaining plans as vague as possible in the hopes of acquiring excess property to generate additional revenue. The lack of a definitive plan alone is fatal to the attempted condemnation and should be held arbitrary and capricious.

¶ 109 I would also find that Monorail's policies for associated development (by private parties), combined with the ***658** agency's insistence on a fee interest even in the absence of a definitive plan, show improper motives. Monorail intended to infringe the constitutional rights of the property owner here to take property which would appreciate and then be resold by the agency in order to help finance its troubled project. This is not a proper motive since the enabling legislation specified the authorized funding sources and did not authorize Monorail to finance its project through real estate speculation (nor could it constitutionally).

III. CONCLUSION

¶ 110 The court has, until today, upheld a " universal rule," which states that if a government agency seeks to condemn more private property than required for its *public* purposes, the excess is not for a public use. Under our constitution, " [w]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." Const. art. I, § 16.

¶ 111 By upholding Monorail's decision to take far more property than it needs from a lawful private owner, and by erroneously applying a deferential standard to the agency's grab of this property, the majority overrules this court's "universal rule" sub silentio. I would uphold our constitution and agree with the property owner that Monorail (and other agencies of its ilk) should be restrained from abusing private property rights. As demonstrated by Kubota and his legacy, such rights are of exceptional import to our citizens. I believe the authors of our constitution understood this vital principle and drafted and overwhelmingly approved article I, section 16 to protect against such abuse. I dissent.

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HTK Management, L.L.C. v. Seattle Popular Monorail Authority
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148 Wash.2d 760, 64 P.3d 618
(Cite as: 148 Wash.2d 760, 64 P.3d 618)

H

Eggleston v. Pierce County
Wash.,2003.

Supreme Court of Washington,En Banc.
Linda EGGLESTON, Appellant,
v.
PIERCE COUNTY, Washington, Myron Smith, Randy Sweem, Roger Gooch, and Ben Benson, Respondents.
No. 71296-4.

Argued June 25, 2002.
Decided March 6, 2003.

Homeowner filed action against county, asserting that she had suffered a compensable takings under the state constitution based on the execution of criminal search warrant and preservation order that rendered her home uninhabitable. The Superior Court, Pierce County, Marywave VanDeren, J., granted summary judgment in favor of county. On direct review, the Supreme Court, Chambers, J., held that the eminent domain provision of the state constitution does not require compensation to be paid for seizure and preservation of evidence, or for destruction of property by police activity.

Affirmed.

Ireland, J., concurred and filed opinion.

Alexander, C.J., dissented and filed opinion.

Sanders, J., dissented and filed opinion.

West Headnotes

[1] Eminent Domain 148 ⚿3

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k3 k. Constitutional and Statutory Provisions. Most Cited Cases
Eminent domain provision of the state constitution is significantly different from its United States constitutional counterpart, and in some ways provides greater protection. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[2] Constitutional Law 92 ⚿965

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k964 Form and Sufficiency of Objection, Allegation, or Pleading
92k965 k. In General. Most Cited Cases
(Formerly 92k46(2))
Generally, before courts will consider parties' state constitutional contentions, the parties are required to present an analysis to determine whether a state constitutional provision affords greater protection than the federal constitution.

[3] Eminent Domain 148 ⚿315

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k315 k. Appeal and Error. Most Cited Cases
In homeowner's claim that she had suffered a compensable takings under the state constitution based on the execution of a criminal search warrant and preservation order that rendered her home uninhabitable, neither party was prejudiced by failure of parties to present the threshold analysis of whether the state constitutional provision affords greater protection than the federal constitution; satisfactory analysis was provided by an amicus, and the threshold analysis was less necessary because it had been previously established that the state constitutional provision provides more protection than its federal counterpart. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

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[4] Eminent Domain 148 ⚿1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k1 k. Nature and Source of Power. Most Cited Cases

Eminent Domain 148 ⚿65.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k65.1 k. In General. Most Cited Cases
The power and the obligation of eminent domain plays a critical role in constitutional governance, and courts are obligated to carefully monitor its exercise. West's RCWA Const. Art. 1, § 16.

[5] Eminent Domain 148 ⚿4

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k4 k. Power of State in General. Most Cited Cases

Eminent Domain 148 ⚿69

148 Eminent Domain
148II Compensation
148II(A) Necessity and Sufficiency in General
148k69 k. Necessity of Making Compensation in General. Most Cited Cases
The State is vested with the power to take real property for public use, but must compensate the owner appropriately. West's RCWA Const. Art. 1, § 16.

[6] Constitutional Law 92 ⚿1066

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1066 k. Police Power. Most Cited Cases
(Formerly 92k81)
Police power is inherent in the state by virtue of its granted sovereignty.

[7] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))

Eminent Domain 148 ⚿2.26

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.26 k. Health. Most Cited Cases
(Formerly 148k2(1))
The State is vested with the power to regulate for the health, safety, morals, and general welfare, and the burdens imposed incidental to such regulations are not takings unless the burdens manifest in certain, enumerated ways.

[8] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))
Police power and the power of eminent domain are essential and distinct powers of government.

[9] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))
A legitimate exercise of "police power," as those terms were understood at the time of the adoption of the state constitution, may result in a compensable taking where the regulation goes "too far." West's RCWA Const. Art. 1, § 16.

[10] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))
Not every government action that takes, damages, or destroys property is a taking. West's RCWA Const. Art. 1, § 16.

[11] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))

Eminent Domain 148 ⚿2.26

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.26 k. Health. Most Cited Cases
(Formerly 148k2(1))
"Eminent domain" takes private property for a public use, while the "police power" regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public. West's RCWA Const. Art. 1, § 16.

[12] Constitutional Law 92 ⚿1066

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1066 k. Police Power. Most Cited Cases
(Formerly 92k81)
The gathering and preserving of evidence is a police power function, necessary for the safety and general welfare of society.

[13] Constitutional Law 92 ⚿592

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(A) General Rules of Construction
92k590 Meaning of Language in General
92k592 k. Plain, Ordinary, or Common Meaning. Most Cited Cases
(Formerly 92k14)
The words of the constitution are interpreted as they would have been commonly understood at the time the constitution was ratified.

[14] Eminent Domain 148 ⚿2.37

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.37 k. Seizure of Evidence. Most Cited Cases
(Formerly 148k2(1.1))
Seizure and preservation of evidence do not give rise to a compensable taking under eminent domain provision of the state constitution. West's RCWA Const. Art. 1, § 16.

[15] Searches and Seizures 349 ⚿85

349 Searches and Seizures
349I In General
349k85 k. Liability for Wrongful Search and Seizure; Actions. Most Cited Cases
The state constitution does not provide for compensation for a lawful search. West's RCWA Const. Art. 1, §§ 7, 16.

[16] Eminent Domain 148 ⚿1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k1 k. Nature and Source of Power. Most Cited Cases

Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))
The judiciary can not exercise eminent domain and may rearrange property rights in accordance with law without it being a taking of property. West's RCWA Const. Art. 1, § 16; Art. 4, § 1; West's RCWA 2.04.190.

[17] Eminent Domain 148 ⚿2.35

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.35 k. Criminal Justice in General. Most Cited Cases
(Formerly 148k2(1.1))
Destruction of property by police activity does not give rise to a compensable taking under eminent domain provision of the state constitution. West's RCWA Const. Art. 1, § 16.

[18] Constitutional Law 92 ⚿2340

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)1 In General
92k2340 k. Nature and Scope in General. Most Cited Cases
(Formerly 92k50)
The proper apportionment of the burdens and benefits of public life are best addressed to the legislature, absent a violation of a right held by an individual seeking redress under the appropriate vehicle.

[19] Eminent Domain 148 ⚿2.37

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
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***763** CHAMBERS, J.
Linda Eggleston's home was rendered uninhabitable by the execution of a criminal search warrant and preservation order. She sought relief in state and federal court for alleged civil rights violations, including violation of article I, section 16 of the Washington State Constitution. Her claims in federal court have been stayed, and the Pierce County Superior Court dismissed her article I, section 16 claim at summary judgment. Today, we are asked only to determine whether she has suffered a compensable takings under article I, section 16 of the Washington State Constitution. We conclude she has not, and affirm.

FACTS

Mrs. Eggleston inherited a two-bedroom Tacoma home from her father in 1977. Mrs. Eggleston lived there with her adult son Brian Eggleston. Pierce County sheriffs received a tip that Brian was dealing drugs and placed the home under

surveillance. Based on that surveillance, sheriffs obtained a search warrant. For safety reasons, officers decided to serve the warrants early in the morning of October 16, 1995. The team assembled at a nearby fire station and proceeded to the unlocked house.

Sheriff's deputies entered the house, a fire fight broke out, and one officer lost his life. Brian was arrested and charged with murder, assault, and various drug crimes. A law enforcement team specializing in homicide investigations searched the home and found drugs, cash, weapons, and drug paraphernalia.**621 [FN1] Brian has since been convicted of drug dealing, and awaits retrial on other charges. *764*State v. Eggleston,* noted at 108 Wash.App. 1011, 2001 WL 1077846, at *1 (2001).

> FN1. Brian Eggleston challenged the constitutionality of this search in his criminal trial, and Mrs. Eggleston challenges it separately in federal court. *See State v. Eggleston,* at 108 Wash.App. 1011, 2001 WL 1077846, at **13-14 (2001); *Eggleston v. Pierce County,* 99 F.Supp.2d 1280 (W.D.Wash.2000) (stayed federal court proceeding). The Court of Appeals noted that the October 16, 1995 search was warrantless, but ruled that any evidence that would have been discovered under the original drug warrant would be admissible. *Eggleston,* 108 Wash.App. 1011, 2001 WL 1077846, at *14. The reasonableness of the search is not before us.

That night, an officer took Mrs. Eggleston to her mother's mobile home. The parties disagree whether Mrs. Eggleston could have moved home after the homicide team completed its search that evening. Brian's defense counsel suggested she not go home until investigations were complete.

On April 15, 1996, the trial court signed a search warrant authorizing the seizure of evidence pertaining to the murder from Mrs. Eggleston's house. The search warrant specifically authorized the police to collect:

Video tapes of police television shows, blood samples, gunshot residue, bed sheet with bloody hand print, two upholstered chairs with bloodstains, [c]ollection of trace evidence. Any other evidence discovered during the reconstruction of the crime scene and documentation of the process with photographs and video taping, measuring, vacuuming, or other evidence techniques necessary to reconstruct the crime scene.

Clerk's Papers (CP) at 264. The search warrant commanded the officers to "diligently search for any evidence, and any other, and if ... evidence material to the investigation or prosecution of said felony ... be found ... bring the same forthwith before me, to be disposed of according to law." CP at 264.

Leaving a copy of the warrant on the family piano, officers collected evidence, including two walls. One wall was a load bearing wall, leaving the house unstable and uninhabitable. Two months later the trial judge issued an order prohibiting "the defense, and any person acting on behalf of the defendant" from "destroying any item of possible evidentiary value" and "preserv[ing] the scene which is the location of the acts ... in its entirety." CP at **765 127.[FN2] Mrs. Eggleston has cooperated with this order and has lived in her mother's mobile home ever since. She has not asked the trial court to modify this order to make it less burdensome upon her. While the attorneys discussed whether Mrs. Eggleston should be allowed to move back into her home, "it was kind of in limbo." CP at 282.

> FN2. The order recites:
> THIS MATTER having come on regularly before the above-entitled court upon the motion of defendant to prevent the State of Washington from attempting to obtain a search warrant to enter the crime scene and/or to seize evidence therefore; and upon the motion of the State of Washington, plaintiff herein, to require the defense to preserve the crime scene intact and to refrain from destruction of any items of possible evidentiary value

> pending further order of this Court; and the court being familiar with the records and files herein, having heard argument of counsel, and being of the opinion that such an Order should issue, and having verbally entered these orders on June 13, 1996; it is hereby
> ORDERED, ADJUDGED AND DECREED that the plaintiff, State of Washington, shall not apply for or obtain a search warrant to enter the crime scene or to seize evidence from said crime scene; it is further
> ORDERED, ADJUDGED AND DECREED that the defense, and any person acting on behalf of the defendant, is hereby restrained and prohibited from destroying any item of possible evidentiary value which is related to the incident which gave rise to the charges herein; and the defense is hereby ordered to preserve the scene which is the location of the acts which gave rise to the charges herein in its entirety and to prevent any individual from destroying any item of potential evidentiary value from said scene.
> CP at 126-27 (Order Requiring Preservation of Scene & Prohibiting Search Warrant).

Brian has been charged and tried for murder, assault, and drug crimes. The first jury found him guilty of the drug and assault charges but deadlocked on murder; the second jury convicted him of second degree murder. *See Eggleston,* 108 Wash.App. 1011, 2001 WL 1077846, at *2. Both juries were taken to the house. The removed walls have ****622** not been used as evidence. The Court of Appeals reversed the assault and murder convictions and remanded for a new trial. *Eggleston,* 2001 WL 1077846, at **1, 34. The order preserving the scene will remain in effect until either vacated or modified, or until the criminal case is complete.

Mrs. Eggleston has not been charged with any crime. Her income consists of $500 a month in social security benefits, $420 of which is dedicated to the rent on her mother's ***766** mobile home. In 1998, she filed a claim for damages with Pierce County. Pierce County rejected her claim. She then brought suit in state and federal court for the destruction and loss of use of her property under several theories, including takings under the Washington and United States Constitutions. Respondent Pierce County removed her state claims to federal court. The federal court issued a stay covering her federal claims and returned the state takings claim to the Pierce County Superior Court. *Eggleston v. Pierce County,* 99 F.Supp.2d 1280, 1283 (W.D.Wash.2000). [FN3] This state takings claim is the only issue before us.

> FN3. The federal district court found it an inappropriate breach of comity to reach the claims based on the Fourth Amendment until Brian Eggleston's criminal trial and appeal were concluded. *Eggleston,* 99 F.Supp.2d at 1282. This determination was upheld by the Ninth Circuit Court of Appeals in an unpublished opinion. The court also found it inappropriate to reach the federal takings claim until our state courts had an opportunity to consider the issue under our own constitution. *Id.* Mrs. Eggleston is, of course, free to pursue her federal claims in federal court as they ripen and as comity concerns fade.

Each party moved for summary judgment. The trial court judge granted summary judgment to the county. We accepted direct review.

ANALYSIS [FN4]

> FN4. This case is here on summary judgment, presenting only questions of law. Review is de novo. *Rivett v. City of Tacoma,* 123 Wash.2d 573, 578, 870 P.2d 299 (1994).

We are mindful that Mrs. Eggleston has suffered a tragic loss of real property. Her loss may be compensable under a variety of theories not before us, including violation of the fourth, fifth, and

fourteenth amendments to the United States Constitution. She has pleaded facts that might give rise to a substantive due process claim. But her claim is not a cognizable takings.

[1][2][3] Article I, section 16 is significantly different from its United States constitutional counterpart, and in some ways provides greater protection. *See, e.g., Mfr'd Hous. Cmtys. of Wash. v. State,* 142 Wash.2d 347, 356 n. 7, 13 P.3d 183 (2000). Generally, we require the parties to present a *Gunwall* analysis (***767***State v. Gunwall,* 106 Wash.2d 54, 720 P.2d 808 (1986)) before we will consider their state constitutional contentions. *See Mfr'd Hous.,* 142 Wash.2d at 356 n.7, 13 P.3d 183. However, in this case, we find that neither party was prejudiced by the lack of an early *Gunwall* analysis, and reach the substantive claim.[FN5]

FN5. Further, a satisfactory *Gunwall* analysis was provided by an amicus, and we find that the threshold function *Gunwall* performs is less necessary when we have already established a state constitutional provision provides more protection than its federal counterpart. *Accord State v. White,* 135 Wash.2d 761, 769, 958 P.2d 982 (1998).

[4][5][6][7] The power and the obligation of eminent domain plays a critical role in constitutional governance, and courts are obligated to carefully monitor its exercise. The State is vested with the power to take real property for public use, but must compensate the owner appropriately. Const. art. I, § 16. Similarly, " [p]olice power is inherent in the state by virtue of its granted sovereignty." *Mfr'd Hous.,* 142 Wash.2d at 354, 13 P.3d 183. The State is vested with the power to regulate for the health, safety, morals, and general welfare, and the burdens imposed incidental to such regulations are not takings unless the burdens manifest in certain, enumerated ways. *See Guimont v. Clarke,* 121 Wash.2d 586, 854 P.2d 1 (1993) (articulating analytical framework for evaluating substantive due process, per se and regulatory takings claims); *Conger v. Pierce County,* 116 Wash. 27, 36, 198 P. 377 (1921); ****623***Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (articulating requirements for federal regulatory takings); *cf. Mugler v. Kansas,* 123 U.S. 623, 668-69, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (giving historical view).

[8][9][10][11][12] Police power and the power of eminent domain are essential and distinct powers of government. *Mfr'd Hous.,* 142 Wash.2d at 354, 13 P.3d 183; *State ex rel. Long v. Superior Court,* 80 Wash. 417, 419, 141 P. 906 (1914); *see generally* William B. Stoebuck, *A General Theory of Eminent Domain,* 47 Wash. L.Rev.. 553, 553-63 (1972). Courts have long looked behind labels to determine whether a particular exercise of power was properly characterized as police power or eminent ***768** domain.[FN6] *See, e.g., Conger,* 116 Wash. 27, 198 P. 377. But clearly, not every government action that takes, damages, or destroys property is a taking. "Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, *or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.*" *Conger,* 116 Wash. at 36, 198 P. 377 (emphasis added). The gathering and preserving of evidence is a police power function, necessary for the safety and general welfare of society. *Cf. Conger,* 116 Wash. at 36, 198 P. 377.

FN6. We recognize "police power" has been used elastically and imprecisely since adoption of our constitution in 1889. *See, e.g.,* Hugh D. Spitzer, *Municipal Police Power in Washington State,* 75 Wash. L.Rev. 495 (2000). Therefore, for the purpose of our taking analysis the term must be understood in the more limited sense as it was then, not necessarily now. Moreover, we also recognize even a legitimate exercise of police power, as those terms were understood in 1889, may also result in a compensable taking where the regulation goes "too far." *Pa. Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

[13] Our constitution provides:
Eminent Domain. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided,* That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

***769** Const. art. I, § 16. The words of the constitution are interpreted as they would have been commonly understood at the time the constitution was ratified. *State v. Brunn,* 22 Wash.2d 120, 139, 154 P.2d 826 (1945). Based on the principles underlying our jurisprudence and evidence from an 1886 Oregon Supreme Court case, we conclude that in 1889, the production of evidence or testimony would not have been considered a taking.

[14] In 1886, the Oregon Supreme Court determined that their takings clause (which included a prohibition on claiming the "particular services" of any man) did not require the state to compensate a witness for his testimony. *Daly v. Multnomah County,* 14 Or. 20, 12 P. 11 (1886). The Oregon court found the duty to provide testimony inherent in citizenship and concluded that duty was categorically distinct from any right to receive compensation under the takings clause. *Daly,* 14 Or. at 21, 12 P. 11 (quoting *Israel v. State,* 8 Ind. 467 (1856)); *accord Blair v. United States,* 250 U.S. 273, 281, 39 S.Ct. 468, 63 L.Ed. 979 (1919). The same principle applies to the production of evidence. Petitioner has not demonstrated that in 1889, the citizens of Washington would have understood the principles underlying police power ****624** and takings significantly differently from the way they were understood by our Oregon neighbors. Therefore we conclude that in 1889, the duty to provide evidence would have not have given rise to a compensable taking.

[15][16] Article I, section 16 requires *prior* compensation. It would be administratively awkward (and constitutionally unlikely) to require prior compensation for the destruction of property by police while apprehending a suspect or executing a search warrant. This is further evidence that article I, section 16 did not, in 1889 (or 1920 when it was amended), reach such claims. Further, the Washington State Constitution specifically states " [n]o person shall be disturbed in his private affairs, *or his home invaded,* without authority of law," clearly evincing that from the beginning of our history the state has had the power to invade homes with the authority of law. Const. art. I, § 7 (emphasis added). Our ***770** state constitution does not provide for compensation for an article I section 7 search; more evidence the takings clause would not originally have been understood to cover this sort of claim.[FN7]

> FN7. The parties do not address the relevance, if any, of the judiciary's independent constitutional authority to enter preservation orders or search and arrest warrants. Clearly, the judiciary can not exercise eminent domain and may rearrange property rights in accordance with law without it being a taking of property. *See* Wash. Const. art. IV; *State v. Fields,* 85 Wash.2d 126, 530 P.2d 284 (1975); RCW 2.04.190 ("The supreme court shall have the power to prescribe ... [the process] of taking and obtaining evidence.").

While this is a case of first impression in Washington, several of our sister states have

already wrestled with it. After a careful survey, we are aware of no case that holds or even supports the proposition that the seizure or preservation of evidence can be a taking. Again, Oregon has considered the issue and declined to find a cognizable taking under its state constitution when evidence is substantially destroyed during a criminal investigation and prosecution. *Emery v. Oregon,* 297 Or. 755, 688 P.2d 72 (1984).

Emery considered the takings claim of a criminal defendant and his mother, co-owners of a pickup truck that was the site of a murder. *Emery,* 297 Or. at 757, 688 P.2d 72. As part of the investigation and prosecution of that murder, the truck was seized and dismantled. *Id.* It was returned to the defendant-still dismantled. *Id.* The Oregon Supreme Court found no takings. It ruled:
"If a person, by virtue of his very existence in civilized society, owes a duty to the community to disclose for the purposes of justice all that is in his control which can serve the ascertainment of the truth, this duty includes not only mental impressions preserved in his brain and the documents preserved in his hands, but also ... the *chattels* and *premises* within his control. There can be no discrimination.. ..
"Apart from specific privileges, * * *, a person is bound, if required to furnish ... his *premises* to the inspection of the tribunal or its duly delegated officers, and to do or exhibit any other thing which may in any form furnish evidence."

***771** *Emery,* 297 Or. at 765-66, 688 P.2d 72 (footnote omitted) (quoting 8 John Henry Wigmore, *Evidence* § 2194, at 76 (John T. McNaughton rev., 1961)). *Accord Alaska Dep't of Natural Res. v. Arctic Slope Reg'l Corp.,* 834 P.2d 134 (Alaska 1991) (no takings to require disclosure of a secret oil database); *McCambridge v. City of Little Rock,* 298 Ark. 219, 227-28, 766 S.W.2d 909 (1989) (seizure of evidence not a takings); *McCoy v. Sanders,* 113 Ga.App. 565, 148 S.E.2d 902 (1966) (no takings to drain a pond to look for a body); *cf. City & County of Denver v. Desert Truck Sales, Inc.,* 837 P.2d 759 (Colo.1992) (no takings to seize truck for failure to display proper identification).
Under the Oregon approach, no takings could arise from the execution of the warrant or preservation order. Nor could a takings be found in property damage caused by the investigation.

Similarly, the New Hampshire Supreme Court considered and rejected a claim that an order blocking the repair of an apartment during an arson trial was a taking. *Soucy v. New Hampshire,* 127 N.H. 451, 452, 506 A.2d 288 (1985) (Souter, J., writing). It also relied on Wigmore:
"For more than three centuries it has now been recognized as a fundamental ****625** maxim that the public ... has a right to every man's evidence."
"[i]t may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-required favor. It is a duty not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He who will live by society must let society live by him, when it requires to."

Soucy, 127 N.H. at 455-56, 506 A.2d 288 (citations omitted) (quoting 8 Wigmore, *supra,* § 2192, at 70, 72). While the New Hampshire Supreme Court found no takings, it was sympathetic, as are we, to the burden imposed on the property owner. The court counseled that a "property owner's remedy lies ... in this court's authority to entertain a request for prospective review of such an order in any apparently ***772** egregious case." *Soucy,* 127 N.H. at 458, 506 A.2d 288. We agree. But we find no takings under the state constitution based on the seizure and preservation of evidence.

A harder question is whether the destruction of property by police activity other than collecting evidence pursuant to a warrant could ever be a compensable taking. Courts considering this issue are divided. *See generally,* David M. Neuenhaus, *State Constitutional Takings Jurisprudence,* 24 Rutgers L.J. 1352 (1992) (collecting cases). In *Customer Co. v. City of Sacramento,* 10 Cal.4th 368, 41 Cal.Rptr.2d 658, 895 P.2d 900 (1995), the California Supreme Court rejected a claim that property destruction during the course of apprehending a suspect could be a taking under the California Constitution.[FN8] *Id.* at 370, 41 Cal.Rptr.2d 658, 895 P.2d 900. After an

exhaustive survey of the history and development of takings, the court concluded that the takings clause was never "applied in a literal manner, without regard to the history or intent of the provision ... [and was not] intended, and never has been interpreted, to impose a constitutional obligation upon the government to pay 'just compensation' whenever a governmental employee commits an act that causes loss of private property." *Id.* at 378, 41 Cal.Rptr.2d 658, 895 P.2d 900. *Accord Kelley v. Story County Sheriff,* 611 N.W.2d 475, 477 (Iowa 2000) (valid exercise of police power and not a compensable takings to breakdown doors of an innocent property owner to serve a warrant).

FN8. The California Constitution says in part: "Private property may be taken or damaged for public use only when just compensation ... has first been paid." Cal. Const. art. I, § 19. The California Supreme Court's opinion is especially important to our analysis since because its takings clause was a model for our own. Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 30 (2002).

The three states that have found a taking in the destruction of property by police during an arrest have rested on fairness and the continued blurring of police power and eminent domain.[FN9] The first state to find a potential cause ***773** of action under somewhat analogous circumstances was Texas. *Steele v. City of Houston,* 603 S.W.2d 786 (Tex.1980).[FN10] Texas police had burned down an innocent person's home to eject suspects. *Id.* at 788. The Texas Supreme Court found that this was not inverse condemnation, but was nonetheless a taking. *Id.* at 789. "Recent decisions by this court have broadly applied the underlying rationale to takings by *refusing to differentiate* between an exercise****626** of police power, which excused compensation, and eminent domain, which required compensation." *Id.* at 789 (emphasis added).

FN9. *See generally* Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage* 20 Hastings L.J. 431 (1969); Arvo Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction,* 20 Stan. L.Rev.. 617 (1968); Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings,* 8 Yale J.L. Human. 31 (1996); Glynn S. Lunney, Jr., Article, *A Critical Reexamination of the Takings Jurisprudence,* 90 Mich. L.Rev. 1892 (1992); C. Wayne Owen, Jr., *Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation when Property is Damaged During the Course of Police Activities?* 9 Wm. & Mary Bill Rts. J. 277 (2000); Frank J. Wozniak, *Right to Compensation for Real Property Damaged by Law Enforcement Personnel in Course of Apprehending Suspect,* 23 A.L.R. 5th 834 (1994).

FN10. The Texas constitution provides in relevant part: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made." Tex. Const. art. I, § 17.

The Minnesota Supreme Court relied on this holding in a similar case. *See Wegner v. Milwaukee Mut. Ins. Co.,* 479 N.W.2d 38 (Minn.1991).[FN11] Police had used tear gas and grenades to drive a suspect from an innocent person's home, wreaking extensive damage. *Id.* at 38. The Minnesota high court found a cognizable takings claim. *Id.* Minnesota found its takings clause was designed to prevent burdens society should bear from being forced onto specific individuals, and not restricted to eminent domain. *Id.* at 39, 41-42; *accord Wallace v. City of Atlantic City,* 257 N.J.Super. 404, 608 A.2d 480 (Law Div.1992).

FN11. Minn. Const. art. I, § 13 reads: " Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first

paid or secured."

[17][18] A clear split on clear grounds exists. Those courts rejecting takings claims based on police destruction of property have relied on the original understanding of the constitutions and the continuing vitality of the separate doctrines of eminent domain and police power. The courts that have ***774** found takings have been justifiably outraged by the destruction of real property owned by third parties utterly unconnected with the alleged crime. While we too feel the pull of the justness of the cause, the vehicle is not article I, section 16. We decline to abandon the framework established by our constitution. *Accord Brunn,* 22 Wash.2d at 139, 154 P.2d 826. The proper apportionment of the burdens and benefits of public life are best addressed to the legislature, absent a violation of a right held by an individual seeking redress under the appropriate vehicle.

We turn briefly to the federal case law on point. The United States Supreme Court has admonished that the takings clause must be read against the historical background of rights and obligations. " ' [a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.' " *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1027, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (quoting *Pa. Coal Co. v. Mahon,* 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922)). The federal courts have considered the question of whether the seizure of evidence is a taking under federal constitutional law, and it appears to us that they would not find the injury to Mrs. Eggleston to be a takings.

The leading case is *Hurtado v. United States,* 410 U.S. 578, 93 S.Ct. 1157, 35 L.Ed.2d 508 (1973). In that case, material witnesses were jailed to assure their appearance in a criminal trial. The detained witnesses brought suit for compensation under the Fifth Amendment, alleging that their property interest in their own time and liberty had been taken. *Hurtado,* 410 U.S. at 579, 93 S.Ct. 1157. The United States Supreme Court ruled that every person has a duty to provide evidence, and the Fifth Amendment does not require the government pay for the performance of a public duty already owed:

It is beyond dispute that there is in fact a public obligation to provide evidence and that this obligation persists no matter how financially burdensome it may be. "... [T]he giving of testimony and the attendance upon court ... in order to testify ***775** are public duties which every person within the jurisdiction of the Government is bound to perform ... and for the performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair v. United States,* 250 U.S. 273, 281[, 39 S.Ct. 468, 63 L.Ed. 979 (1919)].

Hurtado, 410 U.S. at 589, 93 S.Ct. 1157 (footnote and citations omitted); *accord United States v. Friedman,* 532 F.2d 928 (3d Cir.1976).

[19] Similarly, the Fifth Circuit found no takings in the seizure of evidence. The widow of Lee Harvey Oswald sought to recover the value of items of personal property seized in the investigation of President John F. Kennedy's assassination. *Porter v. United States,* 473 F.2d 1329 (5th Cir.1973). Subsequent to the seizure of the evidence, Congress enacted legislation to appropriate the items and to pay fair compensation. The ****627** parties did not dispute that there had been a taking; the primary issue was *when* the taking took place, since the value of the evidence changed during the course of the investigation. The Fifth Circuit rejected the argument that the takings occurred when the evidence was seized. *Id.* at 1335. Instead, it ruled that the takings occurred when the government declared its intent to acquire the property for its own. *Id.* at 1336. "Up until then the government might very well have returned that which it had seized...." *Id.* Under *Porter,* merely holding evidence during an investigation does not constitute a taking.

[20] When law enforcement exceeds its lawful powers, the injured have a right to redress. But if this occurred that October day, there are other, more suitable, remedies available. Extending takings to cover this alleged deprivation of rights would do significant injury to our constitutional system. We stress we do not examine the

applicability of substantive or procedural due process, the fourth, fifth, or fourteenth amendments to the United States Constitution, Washington Constitution article I, section 7, arbitrary and ***776** capricious government action, outrage, trespass, 42 U.S.C. § 1983, or any other cause of action that might be brought. It may be that all would fail. We also stress that we have not been asked to review or limit the preservation order to ease the burden on Mrs. Eggleston. We instruct courts below that such orders must be as unobtrusive and as bearable as possible. *See, e.g., Soucy,* 127 N.H. at 458, 506 A.2d 288; *accord United States v. Columbia Broad. Sys.,* 666 F.2d 364, 371-72 (9th Cir.1982) (recognizing equitable power in civil cases to allocate cost of discovery for nonparty witnesses to demanding party); *Feigin v. Colo. Nat'l Bank, N.A.,* 897 P.2d 814, 820 (Colo.1995) (recognizing the court's equitable power to moderate subpoena that is unreasonable or oppressive).

Summary judgment is affirmed.

JOHNSON, MADSEN, BRIDGE, and OWENS, JJ., and SMITH, J.P.T., concur.IRELAND, J. (concurring).
The majority correctly holds that the taking of physical evidence pursuant to a warrant for a criminal homicide investigation is an exercise of the police power "to conserve the safety, morals, health and general welfare of the public." *Conger v. Pierce Co.,* 116 Wash. 27, 36, 198 P. 377 (1921).

However, I also agree with Justice Alexander that the reasoning of the Texas Supreme Court in *Steele v. City of Houston,* 603 S.W.2d 786 (Tex.1980), is persuasive in the extreme circumstance where an innocent third party's property is destroyed. The majority acknowledges that in this case removal of a load bearing wall rendered the home uninhabitable. Majority at 621. Further, the State obtained an order two months later prohibiting " ' the defense, and any person acting on behalf of the defendant' " from " 'destroying any item of possible evidentiary value' " and " 'preserv[ing] the scene which is the location of the acts ... in its entirety.' " Majority at 621 (alteration in original) (quoting Clerk's Papers at 127).

***777** Whether Mrs. Eggleston, who was not charged with any crime, was even covered by this order might be debated. This case is entirely distinguishable from *Steele* where the police burned down an innocent party's home to smoke out suspects. Whether Mrs. Eggleston was subject to the court's order or not, she was fully capable of seeking clarification or modification of the judge's order at any time, but to this day has not done so. Majority at 621.

Furthermore, in the majority opinion we consider only the eminent domain claim. Eggleston's other claims are unaffected. Therefore, I concur with the majority.

ALEXANDER, C.J. (dissenting).
I dissent. In my view we should adopt the reasoning of the Texas Supreme Court in *Steele v. City of Houston,* 603 S.W.2d 786 (Tex.1980), and reverse the summary judgment that the trial court granted here to Pierce County. In the Texas case, the court was asked to consider whether or not a provision in that state's constitution, which was almost identical to article I, section 16 of our ****628** state's constitution, required the State to pay compensation to the owners of a house that had been burned down by the police in an effort to capture an escaped convict. The Texas court, while acknowledging that the destruction of the property was a "classic instance of police power exercised for the safety of the public," determined that it was nonetheless a taking of an innocent third party's property by the public for which the public must pay compensation. *Steele,* 603 S.W.2d at 793.

Here, deputies of the Pierce County Sheriff's Department rendered Mrs. Eggleston's property completely uninhabitable when they removed a load bearing wall during the process of executing a search warrant for videotapes, blood samples, gunshot residue, a bed sheet, two chairs, and other " evidence material to the investigation." Clerk's Papers at 264. Although Mrs. Eggleston is the mother of an individual who was charged with committing a crime in her house, there is no indication that she had any culpability for her son's transgressions. I believe, as did the Texas court ***778** in similar circumstances, that this was a

taking, notwithstanding the fact that it was a consequence of the county's exercise of the police power. No individual should have to assume a burden of the magnitude the State would impose on Mrs. Eggleston.

I would, therefore, reverse the summary judgment order dismissing her cause of action and let this matter go to trial. At trial Mrs. Eggleston would have the opportunity to prove her entitlement to compensation for the diminution of the value of her home or restoration of it to the condition it was in when the search warrant was served. Because the majority upholds the summary judgment against her, I dissent.

SANDERS, J. (dissenting).

The ministers of the king cannot undermine, weaken, or impair any of the walls or foundation of any houses, be they mansion-houses, or out-houses, or barns, stables, dove-houses, mills, or any other buildings: and they cannot dig in the floor of my mansion-house which serves for the habitation of man; for this, that my house is the safest place for my refuge, safety and comfort, and of all my family; as well in sickness as in health, and it is my defence in the night and in the day, against felons, misdoers, and harmful animals; and it is very necessary for the weal public, that the habitation of subjects be preserved and maintained.[FN1]

> FN1. *The Case of the King's Prerogative in Saltpetre,* 12 Coke 12, 77 Eng. Rep. 1294, 1296 (K.B.1606) (Lord Coke).

I posit if government seizure and confiscation of one's living room wall is not a compensable taking, the words of our state Declaration of Rights have lost their meaning:

No private property shall be taken or damaged for public or private use without just compensation having been first made....

Wash. Const. art. I, § 16. The language of this provision yields but three questions: (1) Is this property?; (2) Was it taken or damaged?; and (3) Has just compensation been ***779** paid? Unlike today's majority opinion, the *constitution* does not except from its plain language property which is seized for evidentiary purposes, and there are no " words" in this provision of our constitution which could possibly have been understood at the time of its ratification to justify such an exception. *Cf. State v. Brunn,* 22 Wash.2d 120, 139, 154 P.2d 826 (1945); majority at 623 ("The words of the constitution are interpreted as they would have been commonly understood at the time the constitution was ratified.").

Rather the majority attempts to engraft a loosely phrased "police power" exception to the takings clause in a context quite different from that where a discussion of the police power might be reasoned or relevant.

In the spirit of what happened to Mrs. Eggleston's house, I suggest we "deconstruct" the majority's argument, and then test its strength at its foundation.

But this task may require a shovel and flashlight since these foundations are not clearly visible. Indeed it appears the majority concedes the essentials of a takings claim since it recognizes, as it must, that Mrs. ****629** Eggleston's property has been taken, no compensation has been paid, and the seizure was consistent with "[t]he talisman of a taking [which] is government action which forces some private persons alone to shoulder affirmative public burdens, 'which, in all fairness and justice, should be borne by the public as a whole.' " *Mission Springs, Inc. v. City of Spokane,* 134 Wash.2d 947, 964, 954 P.2d 250 (1998) (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

Rather than applying plain text and principled theory to examine the question, the majority appears to incant "police power" as some sort of mystical excuse to cart away part of a person's house without paying for it.

In this context the majority does at least concede " the term [police power] must be understood in the more limited sense it was then [1889], not necessarily now." Majority at 623 n. 6. But the majority does not tell us what was ***780** ordinarily meant by the term in 1889 in the context of a

takings claim, let alone this one, much less reconcile the purported doctrine with our constitutional text. Further foundation work therefore seems warranted.

To begin, I do not see "regulatory" taking jurisprudence particularly germane since "regulatory " takings typically involve governmental restrictions on use as opposed to outright seizure, occupation, or physical invasion. *See San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 652-53, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting). We therefore must recognize the facts of this case plainly bespeak of a physical invasion, physical seizure, and confiscation, not an alleged regulatory taking by excessive use restriction.

This having been said, it is certainly true that our court, and other courts in general, have recognized certain exercises of the police power may *not* yield a subject for compensation under the Fifth Amendment to the United States Constitution or article I, section 16 of the state constitution. One such case, cited and relied upon by the majority, is *Conger v. Pierce County,* 116 Wash. 27, 36, 198 P. 377 (1921). *Conger* was an action to recover damages caused by erosion resulting from county changes and improvements to the Puyallup River bank. The county defended by claiming that while the damage admittedly occurred, it was a consequence of the county's legitimate exercise of the police power and therefore not subject to compensation. While our court recognized the theory, it found it inapplicable to those facts because the improvements were not made "to preserve public health, peace, morals or welfare," but rather to reclaim large tracts of wasteland. *Conger,* 116 Wash. at 38, 198 P. 377. This, opined the court, was an exercise of the power of eminent domain, not a legitimate exercise of the police power, no matter what the government called it. Such is also the distinction I think relevant here.

Referring to the police power, *Conger* noted:
***781** Because of its elasticity and the inability to define or fix its exact limitations, there is sometimes a natural tendency on the part of the courts to stretch this power in order to bridge over otherwise difficult situations, and for like reasons it is a power most likely to be abused. It has been defined as an inherent power in the state which permits it to prevent all things harmful to the comfort, welfare and safety of society.... Regulating and restricting the use of private property in the interest of the public is its chief business.... It does not authorize the taking or damaging of private property in the sense used in the constitution with reference to taking such property for a public use.

Conger, 116 Wash. at 35-36, 198 P. 377.

Conger further illuminates the doctrine by reference to 1 John Lewis, *A Treatise on the Law of Eminent Domain* § 6 (2d ed.1900):
"Everyone is bound so to use his own property as not to interfere with the reasonable use and enjoyment by others of their property. For a violation of this duty the law provides a civil remedy. Besides this obligation, which every property owner is under to the owners of neighboring property, he is also bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives.... Whatever restraints the legislature****630** imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby, he is without remedy. It is a regulation, and not a taking, an exercise of police power, and not of eminent domain. But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein under the pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power."

Conger, 116 Wash. at 36-37, 198 P. 377. Although the majority cites *Conger* for the proposition that "[t]he gathering and preserving of evidence is a police power function, necessary for the safety and general welfare of society," majority at 623, there is nothing whatsoever in *Conger* to suggest or support ***782** that proposition. To the contrary *Conger* distinguishes between police power regulations which restrict the harmful use of

property on the one hand and "attempts to deprive the individual of his property," an exercise of eminent domain, on the other.

I posit the case at bar is obviously of the latter category since there was nothing harmful or offensive about the walls which were removed nor did the removal of the walls have anything to do with any governmental purpose or regulation to restrict its harmful use. By all accounts, these walls were innocent.

Ernst Freund's 1904 treatise put it quite succinctly: "[I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful." Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* § 511, at 546-47 (1904). [FN2] This text was written close to the birth of our Declaration of Rights and reflects its Zeitgeist.

> FN2. An extremely articulate explanation is also provided by Roger Pilon:
> We come then to the basic question: When does government have to compensate owners for the losses they suffer when regulations reduce the value of their property? The answers are as follows.
> First, when government acts to secure rights-when it stops someone from polluting on his neighbor or on the public, for example-it is acting under its police power and no compensation is due the owner, whatever his financial losses, because the use prohibited or "taken" was wrong to begin with. Since there is no right to pollute, we do not have to pay polluters not to pollute. Thus, the question is not whether value was taken by a regulation but whether a *right* was taken.
> Proper uses of the police power take no rights. To the contrary, they protect rights.
> Second, when government acts not to secure rights but to provide the public with some good-wildlife habitat, for example, or a viewshed or historic preservation-and in doing so prohibits or "takes" some otherwise *legitimate* use, then it is acting, in part, under the eminent domain power and it does have to compensate the owner for any financial losses he may suffer.
> Roger Pilon, *When is Compensation Required?, Cato Handbook for the 107th Congress* 210 (Jan. 10, 2001), available at http://www.cato.org/pubs/.

The distinction between the prevention of harmful activities, which may not be a taking, and the acquisition of private property for the public good, which is a taking, is unfortunately lost on our majority, although it is recognized or at least applied in most of the cases cited by the majority.

***783** In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), for example, the distinction was applied to state the police power regulations which abate nuisances, for which no compensation for a taking is required as opposed to restrictions on uses " previously permissible under relevant property and nuisance principles," *id.* at 1029-30, 112 S.Ct. 2886, which do require compensation. Viewed in this light, earlier Supreme Court cases to the same effect, including *Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (law prohibiting manufacture of alcoholic beverages not a taking) and *Miller v. Schoene,* 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards not a taking), make perfect sense.

And the doctrine fits neatly within the plain meaning of the words of our state constitution as well, since "property" is certain rights pertaining to a thing, not the ****631** thing itself.[FN3] "Property" is therefore often analogized to a bundle of sticks representing the right to possess, exclude, alienate, etc. *Manufactured Hous. Communities of Wash. v. State,* 142 Wash.2d 347, 366-67, 13 P.3d 183 (2000). However, one stick *not* in the bundle is the right to use one's property in a manner harmful to one's neighbor. Consequently restrictions designed to abate harmful uses or nuisances do not take " property" because there is no property right to do these things in the first instance, i.e., no property right for the government to take.[FN4] We have

recognized "[i]t is permissible*784 for legislative bodies to wield police power to prevent activities which are similar to public nuisances." *Sintra v. City of Seattle,* 119 Wash.2d 1, 15, 829 P.2d 765 (1992). This principle can be traced all the way back to Glanville's admonition in 1187 that "a person may not use his or her own property to the detriment of another." Steven J. Eagle, *Regulatory Takings* § 3-2, at 218 (2d ed.2001) (citing David A. Thomas, *Thompson on Real Property* § 72.02 (1994) (quoting Ranulf de Glanville, *The Laws and Customs of the Kingdom of England or De Legibus et Consuetudinibus Regni Angliae* (1187-1189) bk. 13, chs. 32-39, at 334-43 (John Beame trans., 1812))).

> FN3. William B. Stoebuck, *A General Theory of Eminent Domain,* 47 Wash. L.Rev. 553, 600 (1972).
>
> FN4. *See Douglas W. Kmiec, The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse,* 88 Colum. L.Rev. 1630, 1635 (1988) ("The distinction between harm and benefit also has historical roots traceable to the influence it had upon the drafters and ratifiers of the fifth amendment. It is well accepted, for example, that the drafters of the fifth amendment were greatly familiar with Blackstone's legal commentaries. Blackstone defined property as that claim and exercise 'over the external things of the world, in total exclusion of the right of any other individual in the universe.' Blackstone's notion of 'total exclusion' thus denies the existence of a property right when there is an interference with, or harm to, another's property. Legal dictionaries at the time of the founding paralleled Blackstone, noting that the law precluded the use of property in a manner that would 'injure his neighbor.' [Fn. 34: E.g., G. Jacob, A New Law Dictionary (10th ed. London 1782)]. Significantly, the drafter of the taking clause, James Madison, incorporated the Blackstonian definition in his writing on property and specifically excluded uses of property that harmed others by not 'leav[ing] to every one else the like advantage.' " (footnote omitted)).

Of course seizure of Mrs. Eggleston's walls is not an effort to prevent the use of the walls to the detriment of someone else but is rather a confiscation to facilitate the criminal process, a public good if there ever was one. Jails and courthouses also facilitate the criminal process. But if the government attempts to seize one from a private owner, it must do so the old fashioned way: pay for it. And when the government takes Mrs. Eggleston's walls out of her house, equally it must pay for the walls because it is not exercising its police power to prevent the harmful use of property but rather its eminent domain power to seize private property for public use. In Freund's parlance, it takes the walls because they are useful to the public, not because the walls are harmful.

Last, I come to the majority's discussion of out-of-state cases which have denied compensation to owners of property seized for evidentiary purposes.

At the top of the majority's list is *Emery v. Oregon,* 297 Or. 755, 688 P.2d 72 (1984). *Emery* involved a truck seized as evidence in a criminal prosecution, dismantled and ultimately returned to the owner in pieces. A majority of the Oregon Supreme Court rejected a takings claim, analogizing*785 to *Hurtado v. United States,* 410 U.S. 578, 93 S.Ct. 1157, 35 L.Ed.2d 508 (1973), a case which denied reasonable compensation under the Fifth Amendment (not the Washington Constitution) to aliens detained and incarcerated as material witnesses. True, the United States Supreme Court denied a takings claim under those facts, but it is certainly more than arguable that the obligation to attend a proceeding as a material witness is not " property" in the constitutional sense.[FN5] And imposing the obligation on one to attend trial as a witness arguably lacks the transferability**632 attribute that is normally associated with eminent domain. *See* William B. Stoebuck, *A General Theory of Eminent Domain,* 47 Wash. L.Rev. 553, 599 (1972) ("it is a power of government by which

property of private persons may be transferred to the government....''). Moreover, none of the cases cited in *Hurtado* involved takings claims stemming from the seizure of physical evidence.

> FN5. " 'Anyone who frees himself from the crudest materialism readily recognizes that as a legal term property denotes not material things but certain rights.' " *See* William B. Stoebuck, *A General Theory of Eminent Domain,* 47 Wash. L.Rev. 553, 600 n. 154 (1972) (quoting Morris R. Cohen, *Property and Sovereignty,* 13 Cornell L.Q. 8, 11 (1927)).

I also note the strong dissent by former Oregon Supreme Court Justice Hans Linde, an acknowledged state constitutional law expert and also former law clerk to Washington's own Justice William O. Douglas.[FN6] Linde opined: "If the state needs to disassemble, destroy, or substantially damage such property in the course of its investigation, the state either must reassemble, repair, or replace the property or bear the owner's cost in having this done." *Emery,* at 767-68, 688 P.2d 72. Linde's criticism of the majority analysis was quite incisive:

> FN6. Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights,* 7 U. Puget Sound L.Rev. 491, 508 (1984).

Faced with this holding, the majority in this court in turn needlessly pronounces some very questionable constitutional law. Those pronouncements are questionable because the state doubtless would have to pay compensation if it used plaintiffs' ***786** pickup truck for some other public purpose, for instance for transportation and the compensation would take into account any diminution in value from wear and tear or damage during the state's use. The majority's conclusion that failure to return or restore property used as evidence in unharmed condition does not require compensation, hangs entirely on an analogy with decisions holding that private persons have no constitutional claim to be compensated for serving as witnesses or jurors.
... But there is no need to pursue these analogies, for plaintiffs have made no claim to be compensated for the state's temporary takings of their pickup truck, and without such a claim the state understandably has not invoked any analogy to the public duty to testify or serve as a juror.
The majority's constitutional law also is questionable because it has no principled limits. First, it is by no means limited to the present facts. Property used for evidence may belong to anyone, to a bystander, a landlord, or a business that happens to have the requisite item. The majority's holding would be the same if the vehicle cut up in the state's investigation belonged to Hertz or Avis. The holding would apply if the dismantled property [were] a Greyhound bus or someone's motor home, an expensive camera or a fine watch. It would be the same if the vehicle belonged to the victim of the crime or had been stolen from some third person. Under the majority's theory, all that these victims would be entitled to have returned or restored to them are the pieces left after the state destroyed the vehicle in its investigation.

Id. at 768-70, 688 P.2d 72 (footnote omitted).

I agree with Justice Hans Linde that the Oregon Supreme Court's treatment of this issue is not persuasive. Accordingly there is no reason to follow it.

By the same token, *Soucy v. New Hampshire,* 127 N.H. 451, 506 A.2d 288 (1985) (written by then state supreme court Justice Souter), which denied a takings claim by an apartment house owner who was prevented from repairing the building because it was needed in an arson investigation, is also unpersuasive. First, the New Hampshire Supreme Court characterized the governmental action as an ***787** exercise of the judicial power, not the police power. The court then attempted to "balance" the cost to the private property owner against the benefit inuring to the government if it were required to pay nothing, relying heavily on *Emery v. State* and its analogy to compelled testimony.

Aside from the weakness of *Emery* previously

noted, I find the New Hampshire case unpersuasive because it undermines the most fundamental principle of takings law: no individual should be required to shoulder the cost of providing public goods absent just compensation. Of course it is cheaper for government to steal property than to pay for it, but the takings clause is there precisely to ****633** challenge government's propensity to achieve its "desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon,* 260 U.S. 393, 416, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

But I do find the Texas Supreme Court's analysis in *Steele v. City of Houston,* 603 S.W.2d 786 (Tex.1980) very persuasive. There, owners and residents of a house brought suit against the city for property damage suffered when the police set fire to their home in an effort to recapture escaped convicts hiding in the house. The Texas Supreme Court reversed a lower court dismissal of a claim under article I, section 17 of the Texas Constitution, which provides " 'No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made....' " *Id.* at 788 (quoting Texas Const. art. I, § 17). The Texas Supreme Court held:
The City argues that the destruction of the property as a means to apprehend escapees is a classic instance of police power exercised for the safety of the public. We do not hold that the police officers wrongfully ordered the destruction of the dwelling; we hold that the innocent third parties are entitled by the Constitution to compensation for their property.

Id. at 793. I can think of no reason why Mrs. Eggleston should not be afforded similar treatment under our state constitution. Certainly her property was taken, she was paid nothing, and she is being required to shoulder a public ***788** burden which, in all justice, should be borne by all of society, not herself alone.

I therefore dissent.

Wash.,2003.
Eggleston v. Pierce County
148 Wash.2d 760, 64 P.3d 618

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142 Wash.2d 347, 13 P.3d 183
(Cite as: 142 Wash.2d 347, 13 P.3d 183)

▷
Manufactured Housing Communities of Washington v. State
Wash.,2000.

Supreme Court of Washington,En Banc.
MANUFACTURED HOUSING COMMUNITIES OF WASHINGTON, a nonprofit Washington Corporation, Petitioner,
v.
The STATE of Washington; and Mobile Home Owners of America, Inc., a corporation, Respondent.
No. 66831-1.

Argued March 7, 2000.
Decided Nov. 9, 2000.

Owners of mobile home parks brought action for a declaration that a statutory first-refusal right of mobile home park tenants to buy the park where they live was a facially unconstitutional taking. The Superior Court, Thurston County, William McPhee, J., dismissed the action. Park owners appealed. The Court of Appeals, 90 Wash.App. 257, 951 P.2d 1142, affirmed. On review, the Supreme Court, Ireland, J., held that the challenged statute violated State Constitution's eminent domain provision.

Reversed.

Sanders, J., filed concurring opinion.

Johnson and Talmadge, JJ., filed dissenting opinions.

West Headnotes

[1] Appeal and Error 30 ⚿863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

When reviewing an appeal from summary judgment, an appellate court employs the same analysis as the trial court.

[2] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Appeal and Error 30 ⚿931(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k931 Findings of Court or Referee
30k931(1) k. In General. Most Cited Cases

Legal issues are reviewed de novo, and factual issues are reviewed in the light most favorable to the nonmoving party.

[3] Constitutional Law 92 ⚿1066

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1066 k. Police Power. Most Cited Cases
(Formerly 92k81)

Police power is inherent in the state by virtue of its granted sovereignty.

[4] Constitutional Law 92 ⚿1066

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1066 k. Police Power. Most Cited

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Cases
(Formerly 92k81)
Police power exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution.

[5] Constitutional Law 92 ⚿1066

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1066 k. Police Power. Most Cited Cases
(Formerly 92k81)
Police power is not unlimited and, when stretched too far, is a power most likely to be abused.

[6] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))

Eminent Domain 148 ⚿2.10(1)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(1) k. In General. Most Cited Cases
(Formerly 148k2(1))
Police power measure can violate the State Constitution's eminent domain provision or the Fifth Amendment, and thus be subject to a categorical " facial" taking challenge, when: (1) a regulation effects a total taking of all economically viable use of one's property; or (2) the regulation has resulted in an actual physical invasion upon one's property; or (3) a regulation destroys one or more of the fundamental attributes of ownership (the right to possess, exclude other and to dispose of property); or (4) the regulations were employed to enhance the value of publicly held property. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[7] Eminent Domain 148 ⚿2.31

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.31 k. Rent Control; Housing. Most Cited Cases
(Formerly 148k2(1.1))

Eminent Domain 148 ⚿61

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k60 Taking for Private Use
148k61 k. In General. Most Cited Cases
Mobile home parks-resident ownership act, granting a right of first refusal to tenants of mobile home parks, violated the State Constitution's eminent domain provision; the act, which authorized the State to take from a park owner the right to sell to anyone of choice, at any time, and gave tenants a right to preempt the owner's sale to another and to substitute themselves as buyers, amounted to a taking and transfer of private property without a judicial determination of public necessity, without just compensation having been first paid, and for a private use. West's RCWA Const. Art. 1, § 16; West's RCWA 59.23.015, 59.23.025.

[8] Eminent Domain 148 ⚿13

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases
Under federal law, if the legislature's purpose is legitimate and its means not irrational, a legislative taking can and will withstand a public use challenge provided just compensation is paid. U.S.C.A. Const.Amend. 5.

[9] Constitutional Law 92 ⚿639

92 Constitutional Law

92V Construction and Operation of Constitutional Provisions
92V(D) Construction as Grant or Limitation of Powers; Retained Rights
92k639 k. State Constitutions. Most Cited Cases
(Formerly 92k26)
Because the United States Constitution is a grant of enumerated powers to the federal government and the State Constitution serves to limit the otherwise plenary powers of the state government, the State Constitution can be looked at as a source of great protections directly reserved in the people.

[10] Eminent Domain 148 ⚿61

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k60 Taking for Private Use
148k61 k. In General. Most Cited Cases
Structural differences between State Constitution's eminent domain provision and the Fifth Amendment allow State courts to forbid the taking of private property for private use even in cases where the Fifth Amendment may permit such takings. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16.

[11] Property 315 ⚿7

315 Property
315k7 k. Ownership and Incidents Thereof. Most Cited Cases
Property in a thing consists not merely in its ownership and possession but in the unrestricted right of use, enjoyment and disposal; anything which destroys any of these elements of property, to that extent destroys property itself.

[12] Property 315 ⚿7

315 Property
315k7 k. Ownership and Incidents Thereof. Most Cited Cases
Substantial value of property lies in its use, and if the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right.

[13] Vendor and Purchaser 400 ⚿57

400 Vendor and Purchaser
400II Construction and Operation of Contract
400k57 k. Options. Most Cited Cases
Right of first refusal to purchase is a valuable prerogative, limiting the owner's right to freely dispose of his property by compelling him to offer it first to the party who has the first right to buy.

[14] Vendor and Purchaser 400 ⚿57

400 Vendor and Purchaser
400II Construction and Operation of Contract
400k57 k. Options. Most Cited Cases
Right to grant first refusal is a part of "the bundle of sticks" which an owner enjoys as a vested incident of ownership.

[15] Eminent Domain 148 ⚿6.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k6.1 k. In General. Most Cited Cases
Authority to condemn must be expressly given or necessarily implied.

[16] Eminent Domain 148 ⚿70

148 Eminent Domain
148II Compensation
148II(A) Necessity and Sufficiency in General
148k70 k. Constitutional Provisions. Most Cited Cases
Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. U.S.C.A. Const.Amend. 5.

[17] Eminent Domain 148 ⚿61

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k60 Taking for Private Use
148k61 k. In General. Most Cited Cases

State Constitution explicitly prohibits taking private property solely for a private use, with or without compensation, unless a private use falls within specifically articulated exceptions. West's RCWA Const. Art. 1, § 16.

[18] Eminent Domain 148 ⚿13

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases
For purposes of the State Constitution's eminent domain provision, the use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state. West's RCWA Const. Art. 1, § 16.
West CodenotesHeld UnconstitutionalWest's RCWA 59.23.005, 59.23.010, 59.23.015, 59.23.020 , 59.23.025, 59.23.030, 59.23.035, 59.23.040.

****184 *350** Montgomery, Purdue & Blankinship, John Douglas Blankinship, Shoreline, Montgomery, Purdue & Blankinship, Michael E. Gossler, Seattle, Montgomery, Purdue & Blankinship, Jerry W. Spoonemore, Edmonds, for Petitioner.
Brent David Boger, Vancouver, Pacific Legal Foundation, Robin L. Rivett, Perkins, Coie, William R. Mauer, Bellevue, amicus curiae on behalf of Pacific Legal Foundation.
Stephen Overstreet, Olympia, amicus curiae on behalf of Building Industry Association of Washington.
Groen, Stephens & Klinge, John Maurice Groen, Bellevue, amicus curiae on behalf of Washington Association of Realtors.
Sandra M. Watson, Asst. Seattle City Atty., Ogden, Murphy & Wallace, Wayne Douglas Tanaka, Seattle, amicus curiae on behalf of Washington State Association of Muni.
Christine Gregoire, Atty. Gen., Jerri Lynn Thomas, Alan D. Copsey, Asst. Attys. Gen., Olympia, Bjorklund & Young, Dan Robert Young, Seattle, for Respondent.
IRELAND, J.
Manufactured Housing Communities of Washington challenges the constitutionality ****185** of chapter ***351** 59.23 RCW, the mobile home parks-resident ownership act, which gives qualified tenants a right of first refusal to purchase a mobile home park. Finding an unconstitutional taking of private property for private use in violation of amended article I, section 16 of the Washington State Constitution, we reverse the Court of Appeals.

FACTS

In 1995, Manufactured Housing Communities of Washington (Park Owners), an association of mobile home park owners, commenced this declaratory judgment action. The Park Owners argued that the mobile home parks-resident ownership act (the Act) creates an unconstitutional taking of property in violation of amended article I, section 16 of the Washington State Constitution, as well as the Fifth Amendment of the United States Constitution.

The superior court denied the Park Owners' motion for summary judgment and dismissed the complaint after granting summary judgment to the State. The Court of Appeals affirmed, holding the Act did not amount to an unconstitutional taking of property. *Manufactured Housing Communities v. State,* 90 Wash.App. 257, 259, 951 P.2d 1142 (1998).

With the permission of the Chief Justice, the Pacific Legal Foundation, the Building Association of Washington and the Washington Association of Realtors filed amicus curiae briefs in support of the Park Owners. The Washington State Association of Municipal Attorneys filed an amicus curiae brief supporting the State.

THE ACT

In 1993, the Washington State Legislature, concerned with the availability of mobile home park housing, adopted chapter 59.23 RCW, the Act. RCW 59.23.005. This Act gives mobile home park tenants a right of first refusal when the park owner decides to sell a mobile home park. RCW 59.23.025.

***352** To exercise a right of first refusal, the tenants must organize into a "qualified tenant organization" [FN1] and give the park owner written notice [FN2] of "a present and continuing desire to purchase the mobile home park." RCW 59.23.015. Once the park owner has received such notice, the park owner must notify the tenants of any agreement to sell the park to a third party, as well as disclose the agreement's terms. If the park owner fails to properly notify the qualified tenant organization, a pending third party sale is voidable. RCW 59.23.030.

FN1. "A 'qualified tenant organization' means a formal organization of tenants in the park in question, organized for the purpose of purchasing the park, with membership made available to all tenants with the only requirements for membership being: (a) Payment of reasonable dues; and (b) being a tenant in the park." RCW 59.23.020(3).

FN2. " 'Notice' for the purposes of this section means a writing signed by sixty percent of the tenants in the park indicating that they desire to participate in the purchase of the park, and that they are contractually bound to the other signators of the notice to participate by purchasing an ownership interest that will entitle them to occupy a mobile home space for the remainder of their life or for a term of at least fifteen years." RCW 59.23.015.

Upon receiving proper notice, the tenants have 30 days in which to pay the park owner two percent of the third party's agreed purchase price and to tender a purchase and sale agreement as financially favorable as the agreement between the owner and the third party. RCW 59.23.025. If the tenants meet these requirements within the 30-day period, the park owner must sell them the park. RCW 59.23.025. If, however, the tenants fail to meet these requirements or if, in the case of seller financing, the owner determines selling the park to the tenants would create a greater financial risk than selling to the third party, the owner may proceed with the sale to the third party. RCW 59.23.025. [FN3]

FN3. The Act exempts the transfer or sale of a mobile home park to a relative if the relative signs a written agreement to maintain the property as a mobile home park. RCW 59.23.025, .035.

STANDARD OF REVIEW

[1][2] When reviewing an appeal from summary judgment, an appellate court employs the same analysis as the trial ***353** court. ****186***Margola Assocs. v. City of Seattle,* 121 Wash.2d 625, 634, 854 P.2d 23 (1993). Legal issues are reviewed de novo, and factual issues are reviewed in the light most favorable to the nonmoving party. *Margola,* 121 Wash.2d at 634, 854 P.2d 23. Because this is a facial challenge, no facts are in dispute and we, therefore, decide the Park Owners' claim solely as a matter of law.

CLAIMS

The Park Owners contend chapter 59.23 RCW eviscerates fundamentally important ownership rights. Specifically, the Park Owners believe the Act's mere existence destroys the right to (1) freely dispose of their property, (2) exclude others, and (3) immediately close the sale of a mobile home park. The Park Owners claim that if a park owner decides to sell, chapter 59.23 RCW allows the State to delay the sale and forcibly substitute the owner's chosen buyer with a buyer selected by the State. According to the Park Owners, taking the right of first refusal and then granting this right to private mobile home park tenants, solely for the tenants' private use, violates amended article I, section 16 of the Washington State Constitution, which expressly provides "Private property shall not be taken for private use...." Const. art. I, § 16 (amend.9). The Park Owners believe invalidation of chapter 59.23 RCW is the only appropriate remedy.[FN4]

FN4. The Park Owners make two

additional claims. First, they claim chapter 59.23 RCW violates the takings clause of the United States Constitution. Second, the Park Owners argue that even if chapter 59.23 RCW does not violate the federal takings clause, chapter 59.23 RCW still violates the Washington State Constitution because the addition of the word "damaged" in amended article I, section 16 provides greater protections against governmental takings than the Fifth Amendment of the United States Constitution. Resolving these issues is unnecessary for the disposition of this case. Finding adequate relief under the Washington State Constitution, it is unnecessary to rely on the United States Constitution for guidance in this case. *See Allied Daily Newspapers v. Eikenberry,* 121 Wash.2d 205, 209, 848 P.2d 1258 (1993) (Because a Substitute House Bill violated article I, section 10 of the Washington State Constitution, it was unnecessary to determine whether that Bill also violated the Fourteenth Amendment of the United States Constitution).

The State argues that chapter 59.23 RCW is a legitimate ***354** exercise of the police power and makes several additional arguments against the Park Owners' conclusion that chapter 59.23 RCW constitutes a taking prohibited by either the Washington State Constitution or the United States Constitution. First, the State argues that a right of first refusal is not subject to a takings analysis because it is not a property interest. Second, the State argues that a "total taking" has not occurred because chapter 59.23 RCW does not deny the park owners all economically beneficial use of their property. Third, the State argues that a taking has not occurred through physical invasion because chapter 59.23 RCW does not require the Park Owners to submit to the physical occupation of their land. Finally, the State argues that even if a taking has occurred, chapter 59.23 RCW achieves a legitimate "public use" and, therefore, article I, section 16 requires payment of just compensation rather than the statute's automatic invalidation.

POLICE POWER

[3][4][5] The government, through the police power, often regulates and restricts the use of private property in the interest of the public. Police power is inherent in the state by virtue of its granted sovereignty. *Shea v. Olson,* 185 Wash. 143, 153, 53 P.2d 615 (1936). "It exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution." *Shea,* 185 Wash. at 153, 53 P.2d 615. However, as noted in *Conger v. Pierce County,* 116 Wash. 27, 35-36, 198 P. 377 (1921), the police power is not unlimited and, when stretched too far, is a power " most likely to be abused." In *Conger,* an early Washington case which determined a county had exceeded the scope of the police power, this court said:

[The police power] has been defined as an inherent power in the state which permits it to prevent all things harmful to the comfort, welfare and safety of society. It is based on necessity. ***355** It is exercised for ****187** the benefit of the public health, peace and welfare. Regulating and restricting the use of private property in the interest of the public is its chief business. It is the basis of the idea that the private individual must suffer without other compensation than the benefit to be received by the general public. It does not authorize the taking or damaging of private property in the sense used in the constitution with reference to taking such property for a public use. Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health, and general welfare of the public.

Conger, 116 Wash. at 36, 198 P. 377.

REGULATORY TAKINGS

[6] Under existing Washington and federal law, a police power measure can violate amended article I, section 16 of the Washington State Constitution or the Fifth Amendment of the United States

Constitution and thus be subject to a categorical " facial" taking challenge when: (1) a regulation effects a total taking of all economically viable use of one's property, *Lucas v. So. Carolina Coastal Council,* 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); or (2) the regulation has resulted in an actual physical invasion upon one's property, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); or (3) a regulation destroys one or more of the fundamental attributes of ownership (the right to possess, exclude other and to dispose of property), *Presbytery of Seattle v. King County,* 114 Wash.2d 320, 330, 787 P.2d 907 (1990); or (4) the regulations were employed to enhance the value of publicly held property, *Orion Corp. v. State,* 109 Wash.2d 621, 651, 747 P.2d 1062 (1987).

Regulations have also been found unconstitutional because they violate substantive due process, whether or not ***356** a total taking or physical invasion has actually occurred.[FN5] *See Guimont v. Clarke,* 121 Wash.2d 586, 608, 854 P.2d 1 (1993); *Margola,* 121 Wash.2d at 649, 854 P.2d 23.

FN5. This case concerns only a takings challenge because the Park Owners voluntarily dismissed their substantive due process claim.

STATE CONSTITUTIONAL ANALYSIS

[7] We must determine, based upon a *Gunwall* [FN6] analysis, whether a regulatory taking rather than lawful use of police power has occurred under the Washington State Constitution.[FN7] This undertaking requires us first to examine six nonexclusive neutral criteria to determine whether the Washington State Constitution extends broader rights to its citizens than does the United States Constitution."****188** *Gunwall,* 106 Wash.2d at 61, 720 P.2d 808.

FN6. *State v. Gunwall* 106 Wash.2d 54, 61, 720 P.2d 808 (1986).

FN7. In his dissent, in addition to many political arguments, Justice Talmadge argues that we should follow the "proper course" as outlined in *Guimont,* 121 Wash.2d 586, 854 P.2d 1, and "continue to apply the ample, well-established federal law of regulatory takings." Dissent at 213 (also citing *Highline Sch. Dist. No. 401 v. Port of Seattle,* 87 Wash.2d 6, 11, 548 P.2d 1085 (1976); and *Orion Corp. v. State,* 109 Wash.2d 621, 657-58, 747 P.2d 1062 (1987), *cert. denied,* 486 U.S. 1022, 108 S.Ct. 1996, 100 L.Ed.2d 227 (1988)). However, the *Guimont* court specifically declined to undertake a state constitutional *Gunwall* analysis. *See* 121 Wash.2d 586, 854 P.2d 1. The same was true in *Orion. See* 109 Wash.2d at 657-58, 747 P.2d 1062 . Furthermore, *Highline* nowhere states the proposition for which it is cited-that the takings' provisions in our state and federal are identical. *See* 87 Wash.2d at 11, 548 P.2d 1085. Finally, although *Orion* was decided 18 months after *Gunwall,* it makes no reference to *Gunwall* and, therefore, any assertion that *Orion* holds that federal and state constitution takings analyses are coextensive is without benefit of the analysis required by *Gunwall.*
Consequently, in this case, we answer the call to conduct a *Gunwall* analysis *for the first time* and should not be limited to prior pronouncements of parallelism between our state and federal takings' clauses. I would further note that if *Gunwall* holds any significance in civil cases, pre-*Gunwall* decisions, or decisions sans a *Gunwall* analysis, are not binding. Absent a proper analysis on the *Gunwall* factors, a procedural hurdle we invariably impose upon parties who assert that greater protections exist under our state constitution, the question remains an open one. To ask less of this court than we ask of litigants who come before it would be hypocritical and ill-advised.

The Text of the State Constitution and its Parallels with the Federal Document

The first two *Gunwall* factors are: (1) the textual language ***357** of the state constitutional provision at issue and (2) differences in the parallel texts of the federal and state constitutions.

Amended article I, section 16 of the Washington State Constitution provides:
§ 16 EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided,* That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

On the other hand, the takings clause of the Fifth Amendment states simply: "nor shall private property be taken for public use, without just compensation." A striking textual difference between these two constitutions is the sheer detail of article I, section 16. A second significant difference is the addition of the word *damaged* in the state version and the requirement that compensation must *first* be made. Neither of these differences, however, are key to this analysis.[FN8] What is key is article I, section 16's absolute prohibition against taking private property for private use. ***358** The Fifth Amendment only provides similar protections by inference. Moreover, unlike the Fifth Amendment, article I, section 16 expressly renders the question of public versus private a judicial question: "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public...." Const. art I, § 16 (amend.9).

> FN8. While the Park Owners claim the addition of the word "damaged" in article I, section 16 provides greater protections against government takings than the Fifth Amendment, resolving this issue is unnecessary for the disposition of this case.

This court has consistently focused on textual differences between related state and federal constitutional provisions. Additional language in the state constitution has led to greater protections of individual liberties in several cases. *See, e.g., State v. Brayman,* 110 Wash.2d 183, 201, 751 P.2d 294 (1988) (addition of gender in state equal rights amendment provides more protection than federal equal protection clause); *State v. Boland,* 115 Wash.2d 571, 580, 800 P.2d 1112 (1990) (additional language in state search and seizure clause provides greater protection than federal Fourth Amendment). Hence, as Justice Utter explained, "[o]rdinary rules of textual and constitutional interpretation, as well as the logic of federalism, require that meaning be given to the differences in language between the Washington and United States Constitutions ...." Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights,* 7 U. Puget Sound L.Rev. 491, 515 (1984) (footnotes omitted). The key differences between the Fifth Amendment and article I, section 16 are significant and support a literal interpretation of "private use" ****189** as employed in the Washington State Constitution.

State Constitutional and Common Law History

The third *Gunwall* factor requires an examination of Washington constitutional and common law history. The Park Owners contend that because the federal

constitution predates the state constitution, the state drafters presumably ***359** knew the contents of the federal document and deliberately chose to make the state constitutional provision more detailed, providing greater protection for the property owner. Br. of Pet'r at 17.

During the Washington State Constitutional Convention in 1889, concern was publicly voiced over the taking of private property for private enterprise. *Washington Standard* (Olympia), August 9, 1889, p. 1, col. 4. Moreover, certain constitutional delegates were strongly opposed to various exceptions to the absolute prohibition against taking private property for private use.[FN9]

> FN9. Delegate Turner, for instance, moved to strike "except for private ways of necessity." "Turner said such private ways should not be made at the expense of other private property, but that such a right of way should be included in the purchase of isolated land." Quentin Shipley Smith, The Journal of the Washington State Constitutional Convention, 1889, at 504, (Beverly Paulik Rosenow ed., 1962).

Preexisting State Law

The fourth *Gunwall* factor addresses preexisting state law. The State of Washington has a long history of extending greater protections against governmental takings of private property by literally defining what constitutes "private use." Before examining preexisting Washington law concerning private versus public use, we first compare the use of terms in relevant federal case law. While Washington case law concerns "private/public use" the federal cases concern "private/public purposes." Case law demonstrates these terms are not synonymous.

[8] The United States Supreme Court has repeatedly stated "one person's property may not be taken for the benefit of another private person without justifying public purpose, even though compensation be paid." *Thompson v. Consolidated Gas Utils. Corp.,* 300 U.S. 55, 80, 57 S.Ct. 364, 376, 81 L.Ed. 510 (1937); *Cincinnati v. Vester,* 281 U.S. 439, 447, 50 S.Ct. 360, 362, 74 L.Ed. 950 (1930); *Madisonville Traction Co. v. St. Bernard Mining Co.,* 196 U.S. 239, 251-52, 25 S.Ct. 251, 255-56, 49 L.Ed. 462 (1905); ***360***Fallbrook Irrigation Dist. v. Bradley,* 164 U.S. 112, 159, 17 S.Ct. 56, 63, 41 L.Ed. 369 (1896). However, if the legislature's purpose is legitimate and its means not irrational, a legislative taking can and will withstand a public use challenge provided just compensation is paid. *Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 242, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) (citing *Western & Southern Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648, 671-72, 101 S.Ct. 2070, 2084, 68 L.Ed.2d 514 (1981)).

Washington courts, on the other hand, have provided a more restrictive interpretation of public use. In fact, this court has consistently held that a " beneficial use is not necessarily a public use." *In re Petition of Seattle,* 96 Wash.2d 616, 627, 638 P.2d 549 (1981) (citing *State ex rel. Oregon-Washington R.R. & Navigation Co. v. Superior Court,* 155 Wash. 651, 657-58, 286 P. 33 (1930) and *Hogue v. Port of Seattle,* 54 Wash.2d 799, 825, 831, 837-38, 341 P.2d 171 (1959)). Accordingly, preexisting state law provides a literal definition of "private use. " Washington state courts thus provide Washington citizens with enhanced protections against taking private property for private use.

Differences in Structure Between the State and Federal Constitutions

[9][10] The fifth *Gunwall* factor, structural differences between the federal and state constitutions also favors enhanced protections to Washington citizens by maintaining a literal interpretation of "private use." As previously noted, there are marked differences between the two relevant provisions. But, because the United States Constitution is a grant of enumerated powers to the federal government and the Washington State Constitution serves to limit the otherwise ****190** plenary powers of the state government, the state constitution can be looked at as a source of great protections directly reserved in the people. *Gunwall,* 106 Wash.2d at 62, 720 P.2d 808. Thus,

the structural differences allow Washington courts to forbid the taking of private property for private use even in ***361** cases where the Fifth Amendment may permit such takings.

Matters of Particular State Interest or Local Concern

The sixth and last *Gunwall* factor asks whether the clause deals with matters of particular state or local concern. It suffices to say that taking private property for private use is clearly a matter of local concern consistently recognized by Washington courts. *State ex rel.Wash. State Convention & Trade Ctr. v. Evans,* 136 Wash.2d 811, 822, 966 P.2d 1252 (1998); *In re Seattle,* 96 Wash.2d 616, 638 P.2d 549; *Healy Lumber Co. v. Morris,* 33 Wash. 490, 509, 74 P. 681 (1903).

APPLICATION

Having concluded on the basis of the foregoing analysis that "private use" under amended article I, section 16 is defined more literally than under the Fifth Amendment, and that Washington's interpretation of "public use" has been more restrictive, we next apply these terms to the present case.

Chapter 59.23 RCW authorizes the State to take from the park owner the right to sell to anyone of choice, at any time, and gives tenants a right to preempt the owner's sale to another and to substitute themselves as buyers. This is apparent from RCW 59.23.015, which says that if a qualified tenant organization expresses a "desire" to purchase, "the park may then be sold only according to this chapter. " Moreover, RCW 59.23.025 provides that, if the tenant organization tenders two percent of the price plus a purchase and sale agreement comparable to the third party's offer, "the mobile home park owner must sell the mobile home park to the qualified tenant organization." Therefore, the legislature takes from the park owner the right to freely dispose of his or her property and gives to tenants a right of first refusal to acquire the property by blocking the owner's sale to the third party and substituting themselves as buyers. The result is that the Legislature has authorized ***362** the taking of private property from the owner for the tenants' private use in direct violation of the first sentence of article I, section 16.

Public Benefit Not Necessarily Public Use

The alleged public benefit in this case is even more tenuous than the alleged public use in other Washington cases, which concluded alleged public uses were actually private uses. For example, unlike the proposed development in *In re Seattle,* discussed more fully below, the public here will not own the land. In fact, no member of the general public can even use the parks as would the shoppers envisioned in *In re Seattle. See In re Seattle,* 96 Wash.2d at 619-20, 638 P.2d 549. The statute's design and its effect provide a beneficial use for private individuals only.

The eminent domain provision of the Washington State Constitution provides a complete restriction against taking private property for private use: " Private property shall not be taken for private use.... " Const. art. I, § 16 (amend.9). This absolute language is further strengthened by the enumeration of specific, but here inapplicable, exceptions "for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes." Const. art. I, § 16 (amend.9). These specific exceptions are incorporated into an otherwise absolute prohibition precluding taking private property for private use. This prohibition is not conditioned on payment of compensation. *Whether or not a tenant organization might ultimately pay the owner the same price he or she is to receive from a third party buyer is irrelevant.* Hence, this absolute prohibition against taking private property for private use bars any additional inquiry about compensation and requires invalidation of Chapter 59.23 RCW.

****191 Public Purpose Not Necessarily Public Use**

Some commentators have criticized Washington's

existing ***363** takings analysis, particularly insofar as it relies on an ad hoc inquiry into the specific " purpose of the infringement" to distinguish police power from a regulatory taking. Stanley H. Barer, Comment, *Distinguishing Eminent Domain from Police Power and Tort,* 38 Wash. L.Rev. 607, 609-10 (1963). Professor Richard Settle urges the court to adopt an approach with a higher predictive value. *See* Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't,* 12 U. Puget Sound L.Rev. 339, 386-95 (1989). He proposes that the court recognize, as a threshold principle when examining regulatory challenges to police power,
that there are two categories of police power regulation that are subject to quite different taking standards. These categories divide regulations, on the basis of their purpose and effect, into those that effectively deprive a property owner of a fundamental attribute of property and those that do not.

Settle, *supra,* at 386-87 (footnotes omitted). Professor Settle further notes,[r]egulations that deprive an owner of a fundamental attribute of ownership generally are held to be takings without applying the ripeness requirement or distinguishing between facial and as applied challenges; without balancing public gain and private loss; and without considering diminution in property value, disappointment of investment-backed expectations, whether value lost is offset by reciprocal benefits, and whether reasonable value remains. In short, such regulations are subject to essentially the same doctrine as that applicable to government exercises of eminent domain and government physical invasions traditionally characterized as inverse condemnations.

Settle, *supra,* at 387 (footnote omitted).

Fundamental Attribute of Property Ownership

In the present case, the Park Owners believe that a valuable property right has been taken. Before engaging in a takings analysis, however, it must first be determined if ***364** "property" has actually been taken. William B. Stoebuck, *Nontrespassory Takings in Washington* § 1.7, at 7 (1980).

[11][12] As the Park Owners point out,
" 'Property in a thing consists not merely in its ownership and possession but in *the unrestricted right of use, enjoyment and disposal.* Anything which destroys any of these elements of property, to that extent destroys property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.' "

Ackerman v. Port of Seattle, 55 Wash.2d 400, 409, 348 P.2d 664 (1960) (emphasis added) (quoting *Spann v. City of Dallas,* 111 Tex. 350, 355, 235 S.W. 513 (1921)), *overruled on other grounds by Highline Sch. Dist. No. 401 v. Port of Seattle,* 87 Wash.2d 6, 548 P.2d 1085 (1976). Washington courts have consistently recognized that "the right to possess, to exclude others, or to dispose of property" are "fundamental attribute[s] of property ownership." *Guimont,* 121 Wash.2d at 595, 854 P.2d 1; *Robinson v. City of Seattle,* 119 Wash.2d 34, 50, 830 P.2d 318 (1992); *Presbytery,* 114 Wash.2d at 329-30, 787 P.2d 907. This notion is not unique. The United States Supreme Court has long held property consists of a "group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.,* 323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311 (1945). Similarly, other jurisdictions recognize "[t]he constitutional guaranty securing to every person the right of 'acquiring, possessing, and protecting property,' ... includes the right to dispose of such property in such innocent manner as he pleases...." *Ex Parte Quarg,* 149 Cal. 79, 80, 84 P. 766 (1906); *Tennant v. John Tennant Mem'l Home,* 167 Cal. 570, 575, 140 P. 242 (1914); *Laguna Royale Owners Ass'n v. Darger,* 119 Cal.App.3d 670, 681, 174 Cal.Rptr. 136 (1981).

[13] Although a right of first refusal has no binding effect unless the offeror decides ****192** to sell, at such time it then legally constrains the owner. "A right of first refusal to purchase is a valuable prerogative, limiting the owner's ***365** right to freely dispose of his property by compelling him to offer it first to the party who has the first right to buy."

Northwest Television Club, Inc. v. Gross Seattle, Inc., 26 Wash.App. 111, 116, 612 P.2d 422 (1980), *rev'd in part on other ground by,* 96 Wash.2d 973, 634 P.2d 837 (1981) (citing 11 Samuel Williston, *A treatise on the law of contracts* § 1441A, at 949-50 (3d ed.1968)).

Cases from other jurisdictions are also instructive. For example, a right of first refusal contained in by-laws of a condominium was deemed a property interest sufficient to constitute a covenant running with the land. *Anderson v. 50 East 72nd St. Condominium,* 129 Misc.2d 295, 296, 492 N.Y.S.2d 989, 990 (1985); *see also Taormina Theosophical Community, Inc., v. Silver,* 140 Cal.App.3d 964, 968, 190 Cal.Rptr. 38, 40 (1983) (striking down a right of first refusal in covenants as illegal restraint on alienation). A right of first refusal between joint owners was a sufficient interest in land to constitute a covenant running with the land which could be enforced against the co-owner's successors in interest so long as joint owner continued to own his interest in the property. *HSL Linda Gardens Props., Ltd. v. Seymour,* 163 Ariz. 396, 788 P.2d 129 (1990).

Although a right of first refusal to purchase property is a "preemptive" right it has nonetheless been held to be an interest in property as well. "It [a right of first refusal] is an interest in property, and not merely a contractual right, whereby the preemptioner acquires an equitable right in the property, which vests only when the property owner decides to sell." *Ayres v. Townsend,* 324 Md. 666, 674-75, 598 A.2d 470, 474 (1991) (citing *Ferrero Constr. Co. v. Dennis Rourke Corp.,* 311 Md. 560, 565, 536 A.2d 1137 (1988)). In noting the practical effects of a right of first refusal, the *Ferrero* court observed:

The third type of right of first refusal permits the preemptioner to purchase the property at a price equal to any bona fide offer that the owner, his heirs or assigns desire to accept. In this situation, however, many prospective purchasers, recognizing that a matching offer from the preemptioner ***366** will defeat their bids, simply will not bid on the property. This in turn will depress the property's value and discourage the owner from attempting to sell.

Ferrero, 536 A.2d at 1144.

That a right of first refusal, even one created by statute, can create an interest in property is illustrated by the case of *Crowell v. Delafield Farmers Mut. Fire Ins. Co.,* 463 N.W.2d 737, 740 (1990). Minnesota created a *statutory* right of first refusal for *owners* of farms to protect them against a sale by a creditor enforcing a debt by requiring the creditor agency or corporation to give notice to the former owner and permitting that owner to meet the terms of a third party offer. Minn.Stat. Ann. § 500.24, subd. 5, at 568 (West 1990). The right of first refusal was a sufficient interest in land to provide the basis of an insurable interest for a debtor holding over even after expiration of the period of redemption. Unlike the present case, the Minnesota statute does not implicate takings because it regulates a creditor-debtor relationship.

The diverse array of cases above clearly demonstrates that a right of first refusal, although a preemptive right for the grantee, can also constitute a property interest even as to a grantee. For the grantor, the power to grant a right of first refusal is part and parcel of the power to dispose of property. Until granted, such right remains indivisible from the "bundle of sticks" representing the valuable incidents of ownership along with the right to possess, use and exclude others.

Relying on *Robroy Land Co. v. Prather,* 95 Wash.2d 66, 622 P.2d 367 (1980), the State attempts to avoid the inevitable conclusion that the right of first refusal in the hands of the property owner is a valuable property right. The State's reliance on *Robroy* is erroneous for three reasons. First, unlike the present case, the right of first refusal in *Robroy* was voluntary and given for consideration. 95 Wash.2d at 67, 622 P.2d 367. Second, the holding of *Robroy* deals with the definition of property for purposes of the rule against perpetuities. 95 Wash.2d at 69-70, 622 P.2d 367. It is inapplicable to a takings ****193** question. ***367** Third, *Robroy* analyzes the right of first refusal in the hands of the *grantee,* which is inapplicable when analyzing the grantor's property rights.

[14] Distinguishing a right of first refusal in the hands of a grantee is important because such a right is generally regarded as only preemptive. However, the right to grant first refusal is a part of " the bundle of sticks" [FN10] which the *owner* enjoys as a vested incident of ownership. As Philip Nichols explains, in *The Law of Eminent Domain,* " property is often used to describe the corporeal object that is the subject of ownership, as well as the aggregate rights that an owner possesses in or with respect to such a corporeal object." 2 *Nichols on Eminent Domain* § 5.01[2][d], at 5-10 (3d rev. ed.1999) (footnote omitted). Property is not one single right, but is composed of several distinct rights, which each may be subject to regulation. " [T]he right of property includes four particulars: (1) right of occupation; (2) right of excluding others; (3) right of disposition, or the right of transfer in the integral right to other persons; (4) right of transmission...." *Nichols, supra,* § 5.01[5][b], at 5-30 to 5-31 (citing Jeremy Bentham, *The Principles of Morals and Legislation* 248 (1948)).

> FN10. "In the words of Morris R. Cohen, ' Anyone who frees himself from the crudest materialism readily recognizes that as a legal term property denotes not material things but certain rights.' " William B. Stoebuck, *A General Theory of Eminent Domain,* 47 Wash. L.Rev. 553, 600 (1972) (quoting Morris R. Cohen, *Property and Sovereignty,* 13 Cornell L.Q. 8, 11 (1927)).

In holding the owner of an unexercised option to purchase land possessed a compensable property right, the Supreme Court of California observed:
" '[T]he right to compensation is to be determined by whether the Condemnation has deprived the claimant of a valuable right rather than by whether his right can technically be called an 'estate' or ' interest' in the land.' "

County of San Diego v. Miller, 13 Cal.3d 684, 691, 532 P.2d 139, 119 Cal.Rptr. 491 (1975) (quoting *United States v. 53 1/4 Acres of Land,* 139 F.2d 244, 247 (2d Cir.1943)); *cf.* ***368***Spokane Sch. Dist. No. 81 v. Parzybok,* 96 Wash.2d 95, 633 P.2d 1324 (1981) (holding optionee suffered a loss of property-be it only a contract right-and was therefore entitled to share in condemnation award).

In *Gregory v. City of San Juan Capistrano,* 142 Cal.App.3d 72, 191 Cal.Rptr. 47 (1983),[FN11] several mobile home park owners challenged an ordinance which required owners planning to sell mobile home parks to first offer it to the residents. Finding this provision in the ordinance constituted an impermissible taking, the court reasoned:

> FN11. Although subsequent cases have disapproved of *Gregory* 's takings analysis related to rent control ordinances, these cases have not criticized *Gregory* 's takings analysis relative to a right of first refusal. *See Fisher v. City of Berkeley,* 37 Cal.3d 644, 685 n. 43, 693 P.2d 261, 209 Cal.Rptr. 682 (1984); *Cotati Alliance for Better Hous. v. City of Cotati,* 148 Cal.App.3d 280, 288-89, 195 Cal.Rptr. 825 (1983); *Oceanside Mobilehome Park Owners' Ass'n. v. City of Oceanside,* 157 Cal.App.3d 887, 900, 204 Cal.Rptr. 239 (1984).

This part of the ordinance effects an outright abrogation of well-recognized property rights. The ability to sell and transfer property is a fundamental aspect of property ownership. Property consists mainly of three powers: possession, use, and disposition. (*U.S. v. General Motors Corp.,* supra., 323 U.S. [373] at 377-378 [65 S.Ct. 357, 89 L.Ed. 311 (1945)].) ... This part of the ordinance simply appropriates an owner's right to sell his property to persons of his choice. City has thus ' extinguish[ed] a fundamental attribute of ownership, ' in violation of federal and state Constitutions. (*See Agins v. Tiburon,* supra, 447 U.S. [255] at 262 [100 S.Ct. 2138, 65 L.Ed.2d 106 (1980)]).
In addition, this part of the ordinance appropriates the owner's legally recognized right to sell a right of first refusal or preemptive right in the mobilehome park. It is well established that a preemptive right is a valuable property right which may be bought, sold, and enforced in a court of law.

Capistrano, 142 Cal.App.3d at 88-89, 191 Cal.Rptr. 47 (some citations omitted).

****194** Viewed in the context of an owner's rights, it is apparent that *Robroy* should not control the outcome of this case. It is irrelevant whether the tenants gain a "vested interest" in the property. The question is not what the tenants gain, but what the park owner loses. Here, the statute deprives park owners of a fundamental attribute of ownership.

***369 Statutory Transfer**

The instant case falls within the rule that would generally find a taking where a regulation deprives the owner of a fundamental attribute of property ownership. *See Guimont,* 121 Wash.2d at 605 n. 7, 854 P.2d 1; Settle, *supra,* at 387. However, we are persuaded that a taking has occurred in this case not only because an owner is deprived of a fundamental attribute of ownership, but also because this property right is statutorily *transferred.* In *Ackerman,* this court said:

When restrictions upon the ownership of private property fall into the category of "proper exercise of the police power," they, validly, may be imposed without payment of compensation. The difficulty arises in deciding whether a restriction is an exercise of the police power or an exercise of the eminent domain power. When private property rights are actually destroyed through the governmental action, then police power rules are *usually* applicable. See *State ex rel. Miller v. Cain* (1952), 40 Wash.2d 216, 242 P.2d 505. But, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable. See, generally, *Conger v. Pierce County* (1921), 116 Wash. 27, 198 P. 377, 18 A.L.R. 393.

55 Wash.2d at 408, 348 P.2d 664; *see also Brazil v. City of Auburn,* 93 Wash.2d 484, 490-91, 610 P.2d 909 (1980); *Highline,* 87 Wash.2d at 17, 548 P.2d 1085. Here, the actual effect of chapter 59.23 RCW is more closely akin to the exercise of eminent domain, and not the police power, because the property right is not only taken, but it is statutorily transferred to a private party for an alleged public use.

[15] "Eminent domain" is defined as "[t]he power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character." *Black's Law Dictionary* 523 (6th ed.1990). Similarly, "condemnation" is the "[p]rocess of taking private property for public use through the power of eminent domain." *Id.* at 292. Washington law recognizes ***370** that " '[t]he authority to condemn must be expressly given or *necessarily implied.*' " *State ex rel. Wauconda Inv. Co. v. Superior Court,* 68 Wash. 660, 662, 124 P. 127 (1912) (emphasis added) (quoting *In re Willis Ave.,* 56 Mich. 244, 22 N.W. 871 (1885)). While chapter 59.23 RCW says nothing about condemnation, its condemnatory effect is *necessarily implied.*

Chapter 59.23 RCW provides that when a " qualified tenant organization" gives written notice of "a present and continuing desire to purchase the mobile home park, the park may then be sold *only* according to this chapter." RCW 59.23.015 (emphasis added). Once a park owner thus enters into a purchase and sale agreement with a third party, the park owner "must" notify the tenant and disclose the terms of the agreement. If within 30 days the tenants pay the owner two percent of the third party's agreed purchase price and tenders a purchase and sale agreement at least as favorable as the agreement between the owner and the third party, the owner "must" sell the park to the tenants. [FN12] Chapter 59.23.025 RCW. In effect, Chapter 59.23 RCW takes a fundamentally important property right from the Park Owners and then transfers that right to private parties for an alleged public use.

FN12. As previously noted, if the tenants fail to meet these requirements, or if, in the case of seller financing, the owner determines selling the park to the tenants would create a greater financial risk selling to the third party, the owner may proceed with the sale to the third party. RCW 59.23.025.

Public Use Required

We conclude that a right of first refusal in the hands of the Park Owners is a fundamental attribute of ownership and a valuable property right, and that the forced transfer ****195** of this right under chapter 59.23 RCW constitutes a taking. We next consider whether the proposed use of the property is constitutionally permitted.

[16][17] Both the state and federal constitutions give citizens the guarantee that private property shall not be taken for "public use" without just compensation. U.S. Const. amend. ***371** V; Wash. Const. art. I, § 16 (amend.9). "The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). While the eminent domain provision of the Washington State Constitution similarly recognizes the requirement of just compensation when private property is taken for a public use, this constitutional provision also expressly provides that "Private property shall not be taken for private use...." Const. art I, § 16 (amend.9). Thus, unless a private use falls within article I, section 16's specifically articulated exceptions, the Washington State Constitution explicitly prohibits taking private property solely for a private use-with or without compensation. *See generally Evans,* 136 Wash.2d at 825-32, 966 P.2d 1252. (Sanders, J., dissenting).

The State argues that even if Chapter 59.23 RCW takes the Park Owners' private property, this taking is for a "public use," requiring payment of just compensation for any resulting damage and not automatic invalidation of the statute. According to the State, chapter 59.23 RCW achieves a valid public use by "maintaining a significant source of low income and elderly housing." Br. of Resp't at 36. The State thus contends that even though a right of first refusal benefits private mobile home park tenants, an important public use is involved because "the Legislature found that mobile home parks provide 'a significant' but increasingly insecure source of homeownership for 'many Washington residents.' " Br. of Resp't at 36 (quoting RCW 59.23.005). In short, the State argues that it "has used its police power for a valid public use of preserving dwindling housing stocks for an important and particularly vulnerable segment of society." Br. of Resp't at 38.

The State, apparently assuming "public purpose" and "public use" are always the same thing under existing Washington law, argues that preserving a declining housing ***372** resource so greatly benefits the public that RCW 59.23 plainly converts the private use to a public use. It does not.

Washington courts have a long history of restricting governmental takings of private property under eminent domain by literally defining "private use." This court has often held that a "beneficial use is not necessarily a public use." *In re City of Seattle,* 96 Wash.2d 616, 627, 638 P.2d 549 (1981) (citing *State ex rel. Oregon-Washington R.R. & Navigation Co. v. Superior Court,* 155 Wash. 651, 657-58, 286 P. 33 (1930) and *Hogue v. Port of Seattle,* 54 Wash.2d 799, 825, 831, 837-38, 341 P.2d 171 (1959)).

In re Seattle, for example, addressed the City of Seattle's ordinance implementing a large urban improvement project designed to guard against urban decay. The project required Seattle to acquire all properties necessary for the project and then transfer large portions of the property to private retailers. Recognizing that impeding urban decay and providing shopping areas, owned by private individuals but used by the general public, provide substantial benefits to the public, this court stated: "[i]t may be conceded that the Westlake Project is in 'the public interest'. However, the fact that the public interest may require it is insufficient if the use is not really public." *In re Seattle,* 96 Wash.2d at 627, 638 P.2d 549. This court further stated that "[i]f a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked." [FN13] *In re Seattle,* 96 Wash.2d at 627, 638 P.2d 549.

FN13. This court has held that condemnation for both public and private use is permissible under the state constitution if the proposed private use is subordinate and incidental to the public use, requiring no more property be condemned than necessary for the public use. *State v. Evans,* 136 Wash.2d 811, 822, 966 P.2d 1252 (1998).

****196** [18] As Justice Dunbar, a convention delegate and member of the Judicial Department responsible for the final proposal of article I, section 16 to the convention stated, "the use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public ***373** interest or general prosperity of the state." *Healy Lumber Co. v. Morris,* 33 Wash. 490, 509, 74 P. 681 (1903). This court has often followed a similar line of reasoning. In *Hogue,* for example, this court concluded "it is the duty of the courts to uphold the rights of private property owners against the inroads of public bodies who seek to acquire it for private purposes which they honestly believe to be essential for the public good." *Hogue,* 54 Wash.2d at 838, 341 P.2d 171.

Chapter 59.23 RCW authorizes the State to take from the park owner the right to sell to anyone of choice, at any time, and gives tenants a right to preempt the owner's sale to another and to substitute themselves as buyers. Then, after a mobile home park has been forcibly sold to a "qualified tenant organization," no member of the public can use the park. In fact, only the park tenants can freely use it. Although preserving dwindling housing stocks for a particularly vulnerable segment of society provides a "public benefit," this public benefit does not constitute a public use. *See In re Seattle,* 96 Wash.2d at 638, 638 P.2d 549; *Hogue,* 54 Wash.2d at 825, 341 P.2d 171; *Oregon-Washington R.R. & Navigation Co.,* 155 Wash. at 657-58, 286 P. 33.

The conclusion that chapter 59.23 RCW results solely in a private use is further supported by the Legislature's silence concerning public entitlement to occupy and use the park after the private tenants buy it. To the contrary, RCW 59.23 would vest ownership (and, by extension the new owners' and former tenants' right to possess, exclude others, and dispose of it) in a "qualified tenant organization" with membership requiring "(a) Payment of reasonable dues; and (b) being a tenant in the park." RCW 59.23.020(3). On the face of the Act, the public would not be entitled to "use" the park if a " qualified tenant organization" became the owner.

Although *White Bros. & Crum Co. v. Watson,* 64 Wash. 666, 671, 117 P. 497 (1911), is factually distinct from this case, the late Judge Ellis very clearly and persuasively set out the dangers inherent in the reasoning argued by the State:
***374** If it is something in which he has the actual right of property there is no rule of law nor principle of equity which would warrant a court in taking it from him against his will for the benefit of another. No amount of hardship in a given case would justify the establishment of such a precedent. The next step in the invasion of the right of property would be to invite the courts to measure the comparative needs of private parties, and compel a transfer to the one most needing and who might best utilize the property. If a man may be required to surrender what is his own, because he does not need it and cannot use it, and because another does need it and can use it, then there is no reason why he may not be required to surrender what he needs but little because another needs it much. A doctrine so insidiously dangerous should never find lodgment in the body of the law through judicial declaration.

CONCLUSION

We have found that the statutory grant of a right of first refusal to tenants of mobile home parks, amounts to a taking and transfer of private property without a judicial determination of public necessity and without just compensation having been first paid as required by amended article I, section 16. Moreover, the transfer is legislatively granted to the tenants who are private persons, not the public. Giving the provision in article I, section 16 that " Private property shall not be taken for private use ...

" its deserved effect, chapter 59.23 RCW must be invalidated. The state constitution's absolute prohibition against taking private property solely for a private use is not conditioned on payment of compensation. Whether or not a tenant organization might ultimately pay the ****197** owner the same price he or she is to receive from a third party is irrelevant. Hence, this absolute prohibition against taking private property for private use bars any additional inquiry about compensation and requires invalidation of chapter 59.23 RCW.

Here, the well-intentioned effort of the Legislature to encourage the conversion of mobile home parks to resident ownership conflicts with Washington State's constitutional ***375** prohibition against taking private property solely for a private use. We therefore reverse the Court of Appeals.

GUY, C.J., ALEXANDER, and BRIDGE, JJ., concur.
MADSEN, J., concurs in result only.SANDERS, J. (concurring).
I concur this statute unconstitutionally takes private property for private use, but write separately to add a perspective not otherwise presented.

Police Power Not Implicated

Both the majority and the dissents compare and contrast, more or less, an exercise of the police power, which may require no compensation,[FN1] with an exercise of the power of eminent domain, which always does.

FN1. *See, e.g., Mugler v. Kansas,* 123 U.S. 623, 668-69, 8 S.Ct. 273, 31 L.Ed. 205 (1887). For an enlightened discussion of the *Mugler* rule and its modification in more recent decisions beginning with *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), see John M. Groen & Richard M. Stephens, *Takings Law,* Lucas, *and the Growth Management Act,* 16 U. Puget Sound L.Rev. 1259, 1269-71 (1993).

But a principled dichotomy makes sense only if we use the term "police power" in the sense of its original understanding,[FN2] used by the majority at 186-87 in its extended quotation from *Conger v. Pierce County,* 116 Wash. 27, 36, 198 P. 377 (1921) ("to prevent all things harmful to the comfort, welfare and safety of society"). Certainly by that definition what we have here is not an exercise of the police power at all. Rather it is a garden variety appropriation of an interest in private property for the benefit of others, not a limitation on the use of that property to protect others from harm. *Cf. Sintra, Inc. v. City of Seattle,* 119 Wash.2d 1, 16, 829 P.2d 765 (1992) (regulatory scheme which goes beyond preventing harm to affirmatively provide low-cost housing is not proper exercise of police power but crosses taking threshold). This statute is not an exercise of the police power because the police power, in its purest form, is ***376** the "power to secure rights, through restraints or sanctions, not some general power to provide public goods." Cato Handbook for Congress: Policy Recommendations for the 106th Congress 206 (Edward H. Crane & David Boaz eds., 1999). When the government acquires a public good, it does not do so as an exercise of the police power but rather the power of eminent domain. William B. Stoebuck, *A General Theory of Eminent Domain,* 47 Wash. L.Rev. 553, 569 (1972).

FN2. For an historical discussion, see *Weden v. San Juan County,* 135 Wash.2d 678, 723-29, 958 P.2d 273 (1998) (Sanders, J., dissenting).

The distinction between the legitimate exercise of the police power and the power of eminent domain is aptly described in *Conger* after a most appropriate beginning to its analysis:
It seems to us that a recurrence to certain fundamental principles may assist us in reaching a correct conclusion. One of the greatest contributions of the English-speaking people to civilization is the protection by law of the private individual in the enjoyment of his property and his personal liberties against the demands and aggressions of the public. No better illustration of the progressive growth of this principle can be

found than that contained in our various state constitutions with reference to the taking of private property for a public use.

Conger, 116 Wash. at 33-34, 198 P. 377. In *Conger* Pierce County defended against an action to recover compensation for an alleged inverse condemnation, asserting that its actions were no more than a legitimate exercise of the police power for which no compensation would be due. This caused us to compare and contrast the police power with the power of eminent domain:**198 Indeed, it is the police power theory upon which respondents seem most strongly to rely. It is probable that this power is the most exalted attribute of government, and, like the power of eminent domain, it existed before and independently of constitutions.... It is not inconsistent with nor antagonistic to the rules of law concerning the taking of private property for a public use. Because of its elasticity and the inability to define or fix its exact limitations, there is sometimes a natural tendency on the part of the courts to stretch this power in order to bridge *377 over otherwise difficult situations, and for like reasons it is a power most likely to be abused.... Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.
"... But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power."

Conger, 116 Wash. at 35-37, 198 P. 377 (quoting 1 John Lewis, *A Treatise on the Law of Eminent Domain* § 6 (3d ed.1909)).

The majority's retreat from this principled dichotomy as reflected in *Conger* and like authorities is understandable given modern confusion over the nature of the police power. If, for example, construction of a baseball stadium is now deemed an exercise of the police power, as it was in *CLEAN v. State,* 130 Wash.2d 782, 805, 928 P.2d 1054 (1996), *amended* (Jan. 13, 1997), the language of the common law and the vocabulary of our founders has been so radically altered in meaning so as to require new words to express old ideas. *See* Hugh D. Spitzer, *Municipal Police Power in Washington State,* 75 Wash. L.Rev. 495, 506 (2000) ("This broad definition of the police power appears overinclusive and thus not analytically useful."). Where the police power never ends, the takings clause never begins.

I also take issue with Justice Talmadge's claim that " [a]ll zoning laws would be abrogated under the majority's analysis as well because they interfere with the possession and use of private property." Dissent, Talmadge, J., at 218. Zoning laws which limit the harmful use of one person's property so as to protect the legal entitlements of others are not enacted for the acquisition of public goods, but rather for the protection of private rights in general. I say "in general" because it would be in excess of the legitimate police power to utilize state power to bestow parochial *378 benefits on a particular private person that are not generally available to all society on like terms. *See Norco Constr., Inc. v. King County,* 97 Wash.2d 680, 685, 649 P.2d 103 (1982); *Nagatani Bros., Inc. v. Skagit County Bd. of Comm'rs,* 46 Wash.App. 106, 728 P.2d 1104 (1986), *aff'd as modified by* 108 Wash.2d 477, 739 P.2d 696 (1987). *Cf. State ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 122, 49 S.Ct. 50, 73 L.Ed. 210 (1928) (conditioning land use permit on consent of neighbors violates due process). This distinction is omitted from Justice Talmadge's dissent.[FN3] *Cf.* Dissent, Talmadge, J., at 221-22.

FN3. Justice Talmadge's claim that "[T]he Washington Supreme Court returns to the days when property rights were considered more important than human rights" is long on polemics but short on reason. Dissent, Talmadge, J., at 205. The fallacy of this statement is well summarized by the United States Supreme Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1121-22, 31 L.Ed.2d

> 424 (1972):
> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the " property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Appropriation, Not Protection

The statute at issue effects a taking because it does not protect against harmful, ****199** rights-violating activity, but rather damages, or appropriates, property for the benefit of others. Although, as the dissents point out, the potential dislocation of mobile home tenants resulting from the loss of mobile home park use through sale may be a source of hardship to those tenants, such sale certainly does not breach any of their legal rights or entitlements. Indeed these tenancies are merely temporary by nature, and it is no breach of a tenant's rights for the property owner to terminate the lease upon the contracted date of expiration.

***379** Property is a Bundle of Rights

The dissent raises the further objection that the facts here do not involve a taking of property at all, at least in the same sense as discussed above. I think the answer to this question turns on the very meaning of "property." I agree the issue is exactly as Justice Talmadge poses it: "Properly analyzed, what the park owners claim the statute unconstitutionally took from them is their alleged right to sell their mobile home parks in any manner they might choose to whomever they might choose." Dissent, Talmadge, J., at 212.

But as the " 'legal term property denotes not material things but certain rights,' " Majority at 193 n.10 (quoting William B. Stoebuck, *A General Theory of Eminent Domain,* 47 Wash. L.Rev. 553, 600 (1972)), the dissent fails to recognize that when the government takes one right from the bundle which comprises "property," it thereby takes an aspect or attribute of the property itself. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 433, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (citing *Kaiser Aetna v. United States,* 444 U.S. 164, 176, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) (The right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property.")). *See State ex rel. Smith v. Superior Court,* 26 Wash. 278, 287, 66 P. 385 (1901) (" 'If property, then, consists not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; ....' ") (quoting John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 56 (2d ed.1900)).

If one of the rights of property has been damaged or removed from the bundle, the property has accordingly been damaged or taken to that extent. The unfettered right ***380** to sell one's possession is as "fundamental [an] attribute of property" as is the right to assert an exclusive possessory interest against even the slightest physical invasion. *Guimont v. Clarke,* 121 Wash.2d 586, 602, 854 P.2d 1 (1993) ("[T]he court must first ask whether the regulation destroys or derogates any fundamental attribute of property ownership: including the right to ... dispose of property."); *Loretto,* 458 U.S. at 435-36, 102 S.Ct. 3164 (" Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it' " (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945))); whereas, "even though the owner may retain the bare legal right to *dispose* of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value ...." (*id.* at 436, 102 S.Ct. 3164) (emphasis added)). When the government deprives a person of a fundamental right of property, "the government does not simply

take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.* at 435, 102 S.Ct. 3164 (quoting *Andrus v. Allard,* 444 U.S. 51, 65-66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979)).

Moreover, I would posit, since the right of first refusal may be transferred from one person to another, it is clearly "property" in that sense as well since " 'property' in eminent domain means every species of interest in land and things of a kind that an owner might transfer to another private person." Stoebuck, *supra,* 47 Wash. L.Rev. at 606.

Likewise, I take issue with the view expressed in both dissents that the majority's analysis is somehow inconsistent with *Guimont. Cf.* Dissent, Johnson, J., at 202. In ****200** reality the majority strictly applies the *Guimont* holding that an appropriation for public use of a fundamental attribute of property ownership constitutes a taking in eminent domain. Thus, I disagree with the dissent that "petitioners can only prevail on their takings claim if a right of first refusal is 'property' " in and of itself. Dissent, Johnson, J., at 202. Even if the right of first refusal were not itself "property," imposing such a condition on sale plainly ***381** derogates the unfettered right to transfer, which is a fundamental attribute of ownership in the parcel.

That the public may benefit from the acquisition is certainly no reason to characterize the appropriation as anything other than a taking. Rather, the greater the public benefit from appropriating or damaging the property, the more justified the suspicion that a " taking" has in fact occurred. Therefore when it is argued an acquisition or limitation of one's property is justified because it serves a public purpose, we must question all the more why a discrete property owner must bear a burden that in justice should be borne by many shoulders. *Mission Springs, Inc. v. City of Spokane,* 134 Wash.2d 947, 964, 954 P.2d 250 (1998) ("The talisman of a taking is government action which forces some private persons alone to shoulder affirmative public burdens, 'which, in all fairness and justice, should be borne by the public as a whole.' " (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960))).

Use Restriction Analysis Not Implicated

I agree with the majority's characterization of " existing" law which finds a facial taking in circumstances which may include "a total taking of all economically viable use of one's property," [FN4] Majority at 187, although I would qualify that is not the only circumstance.[FN5] Rather, I think considerations ***382** *pertaining* to use restrictions must be applied to circumstances *involving* use restrictions, not deprivations which destroy or appropriate one of the other fundamentals of property ownership. *Loretto,* 458 U.S. at 427, 430, 102 S.Ct. 3164 (distinction between abrogation of fundamental right of property ownership and "a regulation that merely restricts the use of property" must be observed). Use restrictions must be evaluated based on their impact on the entire parcel, *see, e.g., Presbytery of Seattle v. King County,* 114 Wash.2d 320, 787 P.2d 907 (1990) (wetland use restriction which leaves room for development on the parcel not necessarily a taking); however, deprivations of the fundamental right to possess, exclude, or transfer do not implicate what *use* has been taken, or remains.[FN6] Therefore it makes no sense, and is improper, to balance the fundamental property right appropriated against remaining uses to test whether a taking has transpired. *Cf.* Dissent, Johnson, J., at 203. *Cf. Loretto,* 458 U.S. at 425, 430, 436, 438 n. 16, 102 S.Ct. 3164 ("whether the installation [of a cable TV wire box] is a taking does not depend on whether ****201** the volume of space it occupies is bigger than a breadbox").

FN4. Actually, the original language upon which the majority's observation is based appears in *Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980):
The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.
(Citations omitted.) Absent is our majority's "all." *Cf. Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1019 n. 8, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (An "

analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation.").

FN5. Moreover, once there is a taking of property in the constitutional sense it matters not what the value so appropriated may be except to measure compensation due. As a matter of fact, the cable TV wire which invaded Loretta's property may have *enhanced* its value, yet took the property nonetheless.

FN6. This distinguishes Justice Talmadge's discussion of disaggregating property rights (Dissent (Talmadge, J.) at 220) as a principle limited to use restrictions, but inapplicable to abrogations of other fundamentals of property ownership such as possession, exclusion, or the unfettered right of sale. In *Loretto,* for example, the physical intrusion of a cable television wire did not remotely interfere with the overall use of the parcel, nor even markedly diminish its value; however, because it derogated a fundamental aspect of ownership it was deemed a taking per se. *Cf. Presbytery of Seattle v. King County,* 114 Wash.2d 320, 787 P.2d 907 (1990) (use restrictions which pertain to one portion of a parcel but allow development on the remainder, may withstand a taking challenge).

Examples of this principle include not only physical invasions but also conditions on land use permits which impose an exaction not serving the same legitimate public purpose as the permitting requirement itself. Such is an illegitimate taking which cannot be cured by compensation. In *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), for example, the Supreme Court found an unconstitutional taking when a ***383** building permit was conditioned on the payment of an unrelated exaction, notwithstanding the property owner's full use of his entire parcel for an existing single family residence.

In summary, when a fundamental aspect of property is taken, however slightly, the "character of the governmental action," *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), "not only is an important factor in resolving whether the action works a taking but also is *determinative.*" *Loretto,* 458 U.S. at 426, *see also* 432, 102 S.Ct. 3164 (emphasis added).

In the same vein, I understand Professor Settle's view that deprivations of a fundamental attribute of property ownership constitute a taking to be a comment on existing law, at least enlightened existing law, rather than so much a plea for reformation.

Due Process Distinguished

I do not see substantive due process as adding anything to our understanding about what is or is not a taking, although it is no doubt true, as the majority says, the doctrines have indeed been conflated and confused from time to time. Rather, we have recognized the criteria to establish a taking are " 'quite different' " from that required to establish a due process violation. *Mission Springs,* 134 Wash.2d at 964, 954 P.2d 250 (quoting *Nollan,* 483 U.S. at 835 n. 3, 107 S.Ct. 3141).

I therefore emphatically agree with the majority's conclusion that "[t]he instant case falls within the rule that would generally find a taking where a regulation deprives the owner of a fundamental attribute of property ownership," Majority at 194, and see that as the dispositive feature of the majority's analysis.

Taking for Private Use

So too I agree with the majority's view that this property is not only taken, but taken for private use. This is the feature of the case which most directly invokes our state ***384** constitution's express prohibition against taking private property for private use. As the majority observes, "the Washington State Constitution explicitly prohibits

taking private property solely for a private use-with or without compensation." Majority at 195 (emphasis added). However, I would qualify, the same constitution equally prohibits a taking for even *a partially* private use. *In re Petition of City of Seattle,* 96 Wash.2d 616, 627, 638 P.2d 549 (1981); *State ex rel. Wash. State Convention & Trade Ctr. v. Evans,* 136 Wash.2d 811, 829-36, 966 P.2d 1252 (1998) (Sanders, J., dissenting). Notwithstanding, the appropriation here is not directed to a partially private destination, but a wholly private one.

I therefore concur.

JOHNSON, J. (dissenting).
Although I agree with some of the majority's analysis, I cannot support its conclusion because of three critical flaws in its reasoning. First, the majority improperly focuses its *Gunwall* [FN1] analysis on the *remedy* provided by the Washington State Constitution, while what is at issue here is only the threshold question of whether a taking has occurred, a determination all parties agree is controlled by this court's decision in *Guimont v. Clarke,* 121 Wash.2d 586, 595, 854 P.2d 1 (1993). Next, the majority states that a right of first refusal is a right of property, despite the fact that decisions of this court and the Court of Appeals have concluded it is not. *E.g., Robroy Land Co. v. Prather,* 95 Wash.2d 66, 70-72, 622 P.2d 367 (1980). Finally, the majority disregards the requirement that even if a property right is implicated,****202** under a *facial* challenge of the type presented here no taking occurs unless the mere enactment of the statute denies the property owner *all economically viable use* of his or her land. *Guimont,* 121 Wash.2d at 602, 854 P.2d 1.

FN1. *State v. Gunwall,* 106 Wash.2d 54, 720 P.2d 808 (1986).

The parties agree our first task is to determine whether the enactment of chapter 59.23 RCW constitutes a regulatory taking. *See Guimont,* 121 Wash.2d at 605, 854 P.2d 1 (under facial challenge, party must show mere enactment of statute ***385** works a taking). The parties also concede *Guimont* provides the analytical framework for this determination. Therefore, if we conclude under *Guimont* that a facial taking has occurred, then it is appropriate to move to the next issue: whether article I, section 16 (amend.9) of the Washington State Constitution provides a greater remedy than the Fifth Amendment to the United States Constitution. If, however, *Guimont* tells us no taking has occurred, the question of whether the state constitution might provide a more expansive remedy should be left for another day.

Under *Guimont* 's threshold inquiry, we ask " whether the regulation destroys or derogates any fundamental attribute of property ownership: including the right to possess; to exclude others; ... to dispose of property ... [or] to make *some* economically viable use of the property." *Guimont,* 121 Wash.2d at 602, 854 P.2d 1 (citing *Presbytery of Seattle v. King County,* 114 Wash.2d 320, 329-30, 787 P.2d 907 (1990); *Sintra, Inc. v. City of Seattle,* 119 Wash.2d 1, 14 n. 6, 829 P.2d 765 (1992); *Robinson v. City of Seattle,* 119 Wash.2d 34, 49-50, 830 P.2d 318 (1992); *Lucas v. S. Carolina Coastal Council,* 505 U.S. 1003, 1015-19, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)). In addition, when, as here, an enactment is challenged on its face, we must ask whether "the statute denies the owner of all economically viable use of the property." *Guimont,* 121 Wash.2d at 605, 854 P.2d 1; *accord Presbytery,* 114 Wash.2d at 334, 787 P.2d 907; *Orion Corp. v. State,* 109 Wash.2d 621, 656, 747 P.2d 1062 (1987); *see also Lucas,* 505 U.S. at 1016 & n. 6, 112 S.Ct. 2886; *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 495, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 296, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

Of course, petitioners can only prevail on their takings claim if a right of first refusal is "property." *See Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 124-25, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (describing dismissal of takings claims because the interests involved were not property) (citing ***386***United States v. Willow River Power Co.,* 324 U.S. 499, 65 S.Ct. 761, 89 L.Ed. 1101 (1945); *United States v. Chandler-Dunbar Water*

Power Co., 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063 (1913)); *see also* William B. Stoebuck, *Nontrespassory Takings in Washington* § 1.7, at 7 (1980) (noting the first question in a takings analysis is "to determine if that which has been ' taken' is 'property' ").

Whether a property interest exists for the purposes of a takings analysis is determined by reference to state law. *E.g., Phillips v. Washington Legal Found.,* 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998). Our cases have unquestionably established that not only is a right of first refusal not a fundamental attribute of property ownership, it is not a property right at all. *Robroy,* 95 Wash.2d at 70-72, 622 P.2d 367; *see also Bennett Veneer Factors, Inc. v. Brewer,* 73 Wash.2d 849, 853, 856, 441 P.2d 128 (1968); *Old Nat'l Bank v. Arneson,* 54 Wash.App. 717, 721, 776 P.2d 145 (1989); *Feider v. Feider,* 40 Wash.App. 589, 592, 699 P.2d 801 (1985).[FN2]

> FN2. Numerous other jurisdictions are in accord with this position, many in the context of rejecting a takings challenge. *See, e.g., State v. Block,* 660 F.2d 1240, 1256 (8th Cir.1981) (state statute granting federal government right of first refusal not a taking even if some diminution in value results); *Kaiser Dev. Co. v. City & County of Honolulu,* 649 F.Supp. 926, 937 (D.Haw.1986) (right of first refusal not a compensable interest in regulatory taking challenge); *Gartley v. Ricketts,* 107 N.M. 451, 453, 760 P.2d 143 (1988) (right of first refusal not a "future interest" and, therefore, not subject to rule against perpetuities); *City of Ashland v. Kittle,* 347 S.W.2d 522, 524 (Ky.1961) (right of first refusal is a contract right not compensable in eminent domain proceeding).

The majority attempts to distinguish our holding in *Robroy,* but the distinction is unpersuasive.****203** While the issue in *Robroy* was presented in the context of the rule against perpetuities, its holding that a right of first refusal is not a property interest is equally applicable in this case. This conclusion is consistent with cases analyzing a right of first refusal in other contexts. For example, a right of first refusal does not implicate the real property statute of frauds, nor does it run with the land for the purpose of enforcing an equitable servitude. *See Old Nat'l Bank,* 54 Wash.App. at 722, 776 P.2d 145; *Feider,* 40 Wash.App. at 593, 699 P.2d 801. Because "no interest in land is created by a right of first refusal [,] *only *387 personal rights are affected.*" *Old Nat'l Bank,* 54 Wash.App. at 721, 776 P.2d 145 (emphasis added).[FN3]

> FN3. As the majority notes, petitioners waived their due process claim in this case.
>
> However, the majority's jealous protection of petitioner's contractual rights closely resembles a substantive due process analysis. "It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract." *Lochner v. New York,* 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting).

Furthermore, although *Robroy* addressed a right of first refusal in the hands of a grantee, this is irrelevant for purposes of characterizing the interest as real or personal property. If a grant of a right of first refusal does not create a real property interest in a grantee, then a fortiori legislation affecting a grantor's ability to convey such an option does not " take" any real property interest from the grantor. One cannot take what was never there to begin with.

Even if, however, the statute implicated a fundamental attribute of property ownership, this does not mean a taking has occurred. *E.g., Guimont,* 121 Wash.2d at 605, 854 P.2d 1 (regulation must "destroy" fundamental attribute of property ownership); *Orion,* 109 Wash.2d at 664, 747 P.2d 1062 (addressing whether fundamental attributes of ownership have been "extinguished"). "Not every *infringement* on a fundamental attribute

of property ownership necessarily constitutes a ' taking'." *Guimont,* 121 Wash.2d at 603 n. 6, 854 P.2d 1 (emphasis added) (citing *Presbytery,* 114 Wash.2d at 333 n. 21, 787 P.2d 907); *see also PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 82-83, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980); *Armstrong v. United States,* 364 U.S. 40, 48, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960) (contrasting " total destruction by the Government of all value" with "a mere 'consequential incidence' of a valid regulatory measure"); *Garneau v. City of Seattle,* 147 F.3d 802, 818-19 (9 th Cir.1998) (Williams, J., concurring).

"[F]acial challenges to the economic impact of land use regulations require the landowner to prove the regulation denies *all economically viable use* of the owner's property...." *Guimont,* 121 Wash.2d at 602, 854 P.2d 1 (emphasis added); *see also* ***388** *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 736 & n. 10, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997) (citing *Keystone,* 480 U.S. at 495, 107 S.Ct. 1232; *Hodel,* 452 U.S. at 297, 101 S.Ct. 2352). The majority erroneously omits this requirement in setting forth the standards for a facial taking. Majority at 187. For example, the majority relies on *Presbytery* for the premise that the destruction of a fundamental attribute of property ownership, *by itself,* may serve as the basis for a facial taking. Majority at 187 (citing *Presbytery,* 114 Wash.2d at 330, 787 P.2d 907). *Presbytery*makes clear, however, that such a challenge cannot succeed unless the property owner also establishes that all economical use of his or her property is eviscerated. *Presbytery,* 114 Wash.2d at 333-34, 787 P.2d 907.

In *Guimont,* we were faced with a facial takings challenge to the Mobile Home Relocation Assistance Act, chapter 59.21 RCW. That statute required "the owner of a mobile home park to pay relocation assistance to the park's tenants if the owner wants to close the park or convert it to another use." *Guimont,* 121 Wash.2d at 591, 854 P.2d 1 (citing Laws of 1990, ch. 171, § 2(1)). Despite the obvious economic impacts of this regulation, this court rejected a facial challenge by mobile home park owners because they could not establish that the "regulation of their property's use under the Act denies them all economically viable use of their property." *Guimont,* 121 Wash.2d at 606, 854 P.2d 1.

****204** Whereas *Guimont* involved an actual monetary payment by the park owners, this case involves a far less invasive regulation. Both this court and the Court of Appeals have recognized the minimal economic impact of a right of first refusal. *See, e.g., Robroy,* 95 Wash.2d at 70, 622 P.2d 367 (a right of first refusal did not create a restraint on alienation because *"[t]he marketability of the property remain[ed] unfettered."*) (emphasis added); *Feider,* 40 Wash.App. at 593-94, 699 P.2d 801 (grant of right of first refusal did not "touch and concern" the land because there was *"nothing in the record to indicate the value of the land of the respective parties here was increased or decreased or even affected by the agreement."* (emphasis added)).

Indeed, we have previously suggested that the creation of ***389** a right of first refusal may lead to a more favorable economic result for petitioners:

> The interference with alienation present in a requirement that a designated person be afforded a reasonable opportunity to meet any offer received from a third person by an owner desirous of selling is so slight that the major policies furthered by freedom of alienation are not infringed to a degree which requires invalidation. *Under these circumstances, the owner has two potential buyers at the same price and is assured of a reasonably prompt culmination of the sale.* Such restraints are, therefore, valid.

Robroy, 95 Wash.2d at 70-71, 622 P.2d 367 (emphasis added) (quoting Restatement of Property § 413 cmt. on subsection (1) (1944)). This conclusion is compelling in the context of a facial challenge such as that presented in this case because no evidence of negative economic impact has been established.

Applying this analytical framework established by our case law is also consistent with a recent analogous case that rejected a takings challenge under a similar statute. *See Greenfield Country Estates Tenants Ass'n v. Deep,* 423 Mass. 81, 87, 666 N.E.2d 988 (1996).[FN4] The court held

because the Massachusetts law (like the Washington statute) did not restrict transfers of property by gift, devise, or operation of law, or require property to be sold on terms less favorable than could be received from a third party, the owner's freedom to transfer was minimally limited.

> FN4. In *Greenfield Country Estates,* the statutory provision granting a right of first refusal read as follows:
> "An owner of a manufactured housing community must notify each tenant by certified mail of the owner's intent to sell or lease the land on which the community is located. Such notice must occur within fourteen days after the owner makes public his or her interest to sell the manufactured housing community, and at least forty-five days before the sale or lease occurs.... If more than fifty per cent of the tenants residing in the community, ... so request in writing, the owner must notify each resident of receipt of a bona fide offer to purchase the land that the owner intends to accept. The group then has the right to purchase the community on substantially similar terms and conditions as the third-party bona fide offeror...." *Greenfield Country Estates,* 423 Mass. at 83 n. 7, 666 N.E.2d 988 (citing Mass. Gen. Laws, ch. 140, § 32R (1994)).

The statutory right of first refusal cannot be said materially to ***390** affect the marketability of the property so as to deprive it of economic value. We do not speculate as to the validity of [defendants'] unsubstantiated assertions that the restriction results in a diminution in property value or reduces the pool of prospective purchasers. We note only that mere conditioning the sale of the property to a right of first refusal does not amount to a taking.
Greenfield Country Estates, 423 Mass. at 87, 666 N.E.2d 988 (citing *Andrus v. Allard,* 444 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979)). This reasoning mirrors our jurisprudence on facial regulatory takings and demonstrates that regardless of whether a successful as applied or due process challenge might be brought in the future, the mere enactment of chapter 59.23 RCW does not deprive petitioners of all economically viable use of their land.

The fact this case presents a *facial* challenge to a *regulatory* taking also renders inapplicable the majority's argument that a taking may occur when property is "statutorily transferred." Majority at 194 (emphasis omitted). While this may be true, the cases ****205** cited by the majority for this premise all involve as applied challenges where defined pieces of property were allegedly taken. Majority at 194 (citing *Brazil v. City of Auburn,* 93 Wash.2d 484, 490-91, 610 P.2d 909 (1980); *Highline Sch. Dist. No. 401 v. Port of Seattle,* 87 Wash.2d 6, 17, 548 P.2d 1085 (1976); *Ackerman v. Port of Seattle,* 55 Wash.2d 400, 408, 329 P.2d 210, 348 P.2d 664, *overruled on other grounds by Highline Sch. Dist. No. 401,* 87 Wash.2d 6, 548 P.2d 1085). All three of these cases also involved physical invasions and not regulatory takings. Both *Highline* and *Ackerman* dealt with aircraft flights through private airspace over parcels near the Seattle Tacoma International Airport, while *Brazil* dealt with the City of Auburn's construction of a public roadway on private land. *Highline,* 87 Wash.2d at 7, 548 P.2d 1085; *Ackerman,* 55 Wash.2d at 402-03, 348 P.2d 664; *Brazil,* 93 Wash.2d at 485, 610 P.2d 909. Physical invasions are treated very differently than regulatory takings. *E.g., Presbytery,* 114 Wash.2d at 335, 787 P.2d 907; *Penn Cent. Transp. Co.,* 438 U.S. at 124, 98 S.Ct. 2646. These cases simply do not provide the majority the authority to abandon ***391** the facial challenge and regulatory takings jurisprudence developed over the past two decades by this court.

"[S]ome regulations, by their very nature, are just not subject to facial attack on takings grounds." *S. Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 506 n. 9 (9 th Cir.1990), *cert. denied,* 502 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991). Because no property has been taken from petitioners by the enactment of chapter 59.23 RCW and because petitioners cannot demonstrate the economic harm or physical invasion that must be shown in a facial challenge, I would conclude this statute is not a taking. I would, therefore, not reach the question of whether article I, section 16

(amend.9) of the Washington State Constitution may, in some circumstances, provide greater protection than the Fifth Amendment. I would affirm the Court of Appeals and the superior court on the ground that no unconstitutional facial taking has occurred.

SMITH, J., concurs.
TALMADGE, J. (dissenting).
Today, the Washington Supreme Court strikes down legislation designed to assist the vulnerable, and fundamentally alters the judicial treatment of the police power, an attribute of government long-recognized everywhere as essential to our fundamental notions of ordered liberty. Today, the Washington Supreme Court revives the *Lochner* [FN1] era, when a conservative United States Supreme Court struck down measure after measure of state legislation designed to ease the burdens of the oppressed and those in need. Today, the Washington Supreme Court returns to the days when property rights were considered more important than human rights.

FN1. *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

It is bitterly ironic that this should happen in Washington. This state was an early leader in passing laws banning child labor, setting minimum wages for women and children, promoting mine safety, and limiting hours an employer ***392** could require employees to work-all long before federal legislation on the same subjects. In the early 20th Century, our predecessors on this Court upheld such legislation against the challenges of the powerful in society. The spirit that animated those days has been displaced in this case by a new property rights absolutism that distorts the relationship between the legislative and judicial branches, and usurps for the Washington Supreme Court the role of final arbiter of what is good social legislation.

By unsoundly equating any regulation of land with a taking of land by eminent domain, the majority pushes the parameters of Washington's eminent domain law far beyond anything envisioned by our constitutional framers or the framers of any other state constitution. The majority departs from the traditional elements of takings law we articulated in *Guimont v. Clarke,* 121 Wash.2d 586, 854 P.2d 1 (1993), *cert. denied,* 510 U.S. 1176, 114 S.Ct. 1216, 127 L.Ed.2d 563 (1994), in favor of a novel interpretation of art. I, § 16 of our Constitution by suggesting even a minor regulation of property may be a taking.

****206** Because the mobile home statute in question here does not effect a taking of the mobile home park owners' property, and because the majority's opinion calls into question numerous other appropriate regulations of property pursuant to the State's well-settled police powers, I agree with Justice Johnson's dissent. I write separately to express my concern for what the majority's disposition of this case does to the police power in Washington as it has been exercised since 1889.

A. Mobile and Manufactured Homes

At the outset, this facial challenge to the Mobile Home Parks Resident Ownership Act, chapter 59.23 RCW (the Act), relates to legislation enacted pursuant to the police power of the State of Washington. The majority has appropriately described how the Act operates and the facial constitutional challenge the petitioners have made to the statutory enactment. But, in conjunction with its flawed interpretation, the majority neglects to discuss the practical reality of mobile home life.

***393** Mobile homes are not mobile. The term is a vestige of earlier times when mobile homes were more like today's recreational vehicles. Today mobile homes are "designed to be placed permanently on a pad and maintained there for life." Roger Colton & Michael Sheehan, *The Problem of Mass Evictions in Mobile Home Parks Subject to Conversion,* 8-spring, J. Affordable Housing & Community Dev. L. 231, 232 (1999). "Once ' planted' and 'plugged in,' they are not easily relocated." *Miller v. Valley Forge Vill.,* 43 N.Y.2d 626, 403 N.Y.S.2d 207, 374 N.E.2d 118, 120 (1978) . Moreover,
In most instances a mobile home owner in a park is required to remove the wheels and anchor the home

to the ground in order to facilitate connections with electricity, water and sewerage. Thus it is only at substantial expense that a mobile home can be removed from a park with no ready place to go.

Malvern Courts, Inc. v. Stephens, 275 Pa.Super. 518, 419 A.2d 21, 23 (1980).

Physically moving a double- or triple-wide mobile home involves "unsealing; unroofing the roofed-over seams; mechanically separating the sections; disconnecting plumbing and other utilities; removing carports, porches, and similar fixtures; and lifting the home off its foundation or supports." Colton & Sheehan, *supra,* 232. Costs of relocation, assuming relocation is even possible for older units, can range as high as $10,000. *Id.* It is the immobility of mobile homes that "accounts for most of the problems and abuses endured by mobile home tenants." Luther Zeigler, *Statutory Protections for Mobile Home Park Tenants-The New York Model,* 14 real Estate L.J. 77, 78 (1985).

The effects on mobile home owners (home owners) faced with moving because mobile home park owners (park owners) want to convert a mobile home park to another use can be devastating. A home owner owns the mobile home, but only rents the land on which it sits. Closure and conversion of a mobile home park force the owner either to ***394** move, or to abandon what may be his most valuable equity investment, a mobile home, to the developer's bulldozer. Displacement from a mobile home park can "mean economic ruin for a mobile home owner." Karl Manheim, *Tenant Eviction Protection and the Takings Clause,* 1989 wis. L. Rev. 925, 956 n.179 (1989). *See Granat v. Keasler,* 99 Wash.2d 564, 663 P.2d 830 (discussing similar problems for owners of houseboats renting moorage),*cert. denied,* 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983).

Availability of affordable housing is one of the goals of the Growth Management Act. RCW 36.70A.020(4). Mobile homes present affordable housing options for large segments of society. The President's Commission on Housing declared:
[M]anufactured housing is a significant source of affordable housing for American families, particularly first-time homebuyers, the elderly, and low- and moderate-income families.... Almost all local and state regulations, however, discriminate against manufactured housing. These discriminatory policies cause communities to ignore and forgo a promising opportunity to narrow the gap between supply and demand for affordable housing.

****207** Molly A. Sellman, *Equal Treatment of Housing: A Proposed Model State Code for Manufactured Housing,* 20 urb. L. 73, 74 n.3 (1988) (quoting the Report of the President's Commission on Housing 56, 85 (1982)).

The human dimension to mobile home ownership is considerable. "Mobile home residents are typically poorer than the average rental household, with incomes lower by one-third. Many home owners are elderly residents with friends, contacts, and community that have centered on the park for years, if not decades." Colton & Sheehan, *supra,* at 233.
The costs to the community in terms of providing public housing for evicted mobile home owners who are low-income families or the elderly, for example, are enormous. Exacerbating the problem is the scarcity of mobile home parks:
Some towns exclude mobile homes altogether; others limit ***395** how long the homes can stay in town. Most frequently, municipalities confine mobile homes to privately-owned mobile home parks and restrict the number of parks permitted in the town. Consequently, there is a major shortage of space for mobile homes. Thus the owner who needs to rent a lot for his mobile home has no choice but to enter the "park owner's market" in which the demand for space far exceeds the supply of available lots.

Thomas G. Moukawsher, *Mobile Home Parks and Connecticut's Regulatory Scheme: A Takings Analysis,* 17 conn. L. Rev. 811, 814-15 (1985) (footnotes omitted). *See* Jay M. Zitter, Annotation, *Validity of Zoning or Building Regulations Restricting Mobile Homes or Trailers to Established Mobile Home or Trailer Parks,* 17 A.L.R.4th 106 (1982). Not surprisingly, abuses abound in this seller's market:Park owners have been criticized for charging exorbitant entrance fees

and for claiming from their tenants miscellaneous, and often arbitrary, charges, in addition to fees for extra cars, children, pets, or guests. Most important, the combination of short leases, entrance fees, and prohibitions of on-the-lot sales have allowed some park owners to make substantial profits by evicting home owners and their homes. Because of the space shortage, many evicted mobile home owners have lost their investments. Park owners have not allowed the homes to be sold on their land, and there are few, if any, other places to put them. Consequently, the evicted homes are worth much less when offered for sale.

Moukawsher, *supra,* at 815 (footnotes omitted). The Maryland Court of Appeals in 1980 detailed abuses afflicting mobile home tenants:Despite the rising popularity of relatively low cost mobile homes, many communities have enacted zoning regulations which exclude them entirely or severely limit the areas where they may be placed, frequently restricting them to mobile home parks. Thus, the mobile home owner is compelled to rent space from the park owners who, because of the limited availability of space and the high cost of relocation, are able to dictate unfavorable rental terms and conditions. As a result, mobile home owners often have been forced to buy mobile homes from ***396** the park owner in order to obtain a site, to pay excessive entrance fees, to buy specified commodities from specified dealers, to pay the park owner a commission on the sale of the mobile home, or, upon sale, to remove and pay an exit fee.

Cider Barrel Mobile Home Court v. Eader, 287 Md. 571, 414 A.2d 1246, 1248 (1980).

Manifestly, home owners have markedly less bargaining power-in fact, they have none, as upon eviction they become homeless and may lose what is likely their most valuable asset, their homes-than do park owners. As a consequence, home owners are not in a position individually to bargain at arm's length with their landlords, the park owners.

B. The Legislation

In response to these inequities and the abuses home owners often suffer, and in an attempt to bolster the home owners' bargaining position, the Legislature enacted the Mobile Home Relocation Assistance Act in 1989, chapter 59.21 RCW, requiring the owner of a mobile home park to pay relocation assistance to the park's tenants if the owner ****208** wanted to close the park or convert it to other use. [FN2] The law provided $4,500 relocation assistance for single-wide mobile homes and $7,500 relocation assistance for double-wide mobile homes. Laws of 1990, ch. 171, § 2(1). We struck down the law as a violation of the park owners' substantive due process rights under the Fourteenth Amendment, but we also held the law was not a taking of property without just compensation. *Guimont,* 121 Wash.2d at 614, 854 P.2d 1.

FN2. Most other states have also reacted to the plight of mobile home owners and have enacted protective legislation. *See* Appendix, *infra.*

Apparently in response to *Guimont* and as a reflection of continuing concern about the plight of mobile home owners, the Legislature enacted chapter 59.23 RCW, expressing its findings and intent as follows:
The legislature finds that mobile home parks provide a significant source of homeownership for many Washington residents, but increasing rents and low vacancy rates, as well ***397** as the pressure to convert mobile home parks to other uses, increasingly make mobile home park living insecure for mobile home owners. The legislature also finds that many homeowners who reside in mobile home parks are also those residents most in need of reasonable security in the siting of their manufactured homes. It is the intent of the legislature to encourage and facilitate the conversion of mobile home parks to resident ownership in the event of a voluntary sale of the park.

RCW 59.23.005.[FN3] The bill passed both the Senate and the House of Representatives without a single dissenting vote in either body. The House Bill Report of April 8, 1993 states:

> FN3. A similar statute in Massachusetts contains the following statement of legislative intent:
> Unless mobile home owners receive further protection in relocating their homes upon mobile home park discontinuances than the law now affords, this increasing shortage of mobile home park sites and increasing cost of relocation will generate serious threats to the public health, safety, and general welfare of the citizens of the commonwealth, particularly the elderly and persons of low and moderate income.
> mass. Gen. Laws Ann., ch. 140, § 32L, Historical and Statutory Notes at 512 (West 1991).

This is a compromise worked out between park owners and tenants to address mobile home landlord-tenant issues. Agreement has been reached on such issues as removing problem tenants from the park, eliminating no-cause evictions with 12 months notice, *allowing tenants to purchase parks when the owner is selling to other than a relative,* and allowing park owners to purchase mobile homes for sale by the tenant to other than relatives. This bill will improve the relationship between good tenants and park owners, and will better enable the few problem tenants and the few problem park owners to be addressed more effectively.
H.B. Rep. ESSB 5482 (Wash.1993) (emphasis added). According to the same bill report, there was no testimony against the bill, while two representatives of the Washington Mobile Home Park Owners spoke in support of the bill. Two years later the park owners brought the present lawsuit claiming chapter 59.23 RCW is unconstitutional.

***398** C. The Act Does Not Take the Park Owners' Property

In agreeing with the park owners, the majority says: "The instant case falls within the rule that would generally find a taking where a regulation deprives the owner of a fundamental attribute of property ownership." Majority op. at 194. For the majority, any regulation affecting any fundamental attribute of property is a taking. Thus does the majority facilely dispose of 130 years of American regulatory taking jurisprudence, beginning with *Pumpelly v. Green Bay & Miss. Canal Co.,* 80 U.S. (13 Wall.) 166, 20 L.Ed. 557 (1871), and continuing to the present day:
Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that "there must be an exercise of eminent domain and compensation to sustain the act ... depends upon the particular facts." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 [, 43 S.Ct. 158, 67 L.Ed. 322] (1922); accord, ****209***Keystone Bituminous Coal, supra,* at 473-474[, 107 S.Ct. 1232]. Consistent with this understanding, we have described determinations of liability in regulatory takings cases as " 'essentially ad hoc, factual inquiries,' " *Lucas, supra,* at 1015[, 112 S.Ct. 2886] (quoting *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124[, 98 S.Ct. 2646, 57 L.Ed.2d 631] (1978)), requiring "complex factual assessments of the purposes and economic effects of government actions."

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). No factual inquiries or complex assessments beset the majority and deter it from formulating its unprecedented rule. The majority's analysis is flawed from the outset.

1. The Majority's *Gunwall* Analysis and Property Rights in Washington.

Without saying why it is necessary to do so, the majority undertakes an analysis pursuant to *State v. Gunwall,* 106 Wash.2d 54, 720 P.2d 808 (1986). The original intent of a *Gunwall* analysis was to determine whether "the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution." *Id.* at 61, 720 P.2d 808.

***399** The majority looks at the first sentence of wash. constT. art. I, § 16-"Private property shall not be taken for private use" [FN4]-and concludes our constitution provides more protection for

private property owners than does the Fifth Amendment to the United States Constitution. How the majority gets there is a monumental puzzle, because the Fifth Amendment does not mention " private use." The Fifth Amendment speaks only of public use: "nor shall private property be taken for public use, without just compensation."

> FN4. "What is key is article I, section 16's absolute prohibition against taking private property for private use." Majority op. at 188.

The majority tells us that we have taken a much more restrictive view of the meaning of *public use* than has the United States Supreme Court. Majority op. at 189. The majority is quite right. *Compare, e.g., In re Petition of Seattle,* 96 Wash.2d 616, 627, 638 P.2d 549 (1981) (holding a beneficial use is not necessarily a public use), *with Haw. Hous. Auth. v. Midkiff,* 467 U.S. 229, 242, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) (public use requirement coterminous with the scope of a sovereign's police powers.).[FN5] But the term *public use* does not appear in the first sentence of art. I, § 16, the provision the majority says is key to its analysis. It would have been a more revealing and more fruitful exercise for the majority to have compared the constitutional meaning of the sentence it relies on in our constitution-"Private property shall not be taken for private use"-with the United States Supreme Court's treatment of that concept.

> FN5. Washington's public use and public purpose standards are more stringent than those of federal jurisdictions. *See* Victor B. Flatt, *A Brazen Proposal: Increasing Affordable Housing Through Zoning and the Eminent Domain Powers,* 5 Stan. L. & Pol'y Rev. 115 (1994).

In 1896, the Court addressed the question of takings for private use and said categorically: "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United ***400** States." *M. Pac. Ry. Co. v. State of Neb.,* 164 U.S. 403, 417, 17 S.Ct. 130, 41 L.Ed. 489 (1896). This proposition became so well entrenched in federal jurisprudence that the Court of Appeals for the Ninth Circuit was able to say 100 years later: "It is overwhelmingly clear from more than a century of precedent that the government violates the Constitution when it takes private property for private use...." *Armendariz v. Penman,* 75 F.3d 1311, 1320-21 (9th Cir.1996). Indeed, there is a primeval notion in American law to the effect that the taking of private property for private use is not even a permissible action of government. In a famous passage, Justice Samuel Chase said in *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648 (1798):

An ACT of the Legislature (for I cannot call it a law) contrary to the great first ****210** principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.

Justice Chase was speaking here not of constitutional law, but of natural law, of powers no government may exercise because "general principles of law and reason forbid them." [FN6] The aphorism about the prohibition against taking ***401** from *A* and giving to *B* is enshrined in American law. Justice Story said in 1829: "We

know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union." *Wilkinson v. Leland,* 27 U.S. (2 Pet.) 627, 657, 7 L.Ed. 542 (1829). The Supreme Court has cited Chase's aphorism as recently as 1998. *See Eastern Enters. v. Apfel,* 524 U.S. 498, 522, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998).

> FN6. Justice Iredell did not agree:
> If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.
> *Calder,* 3 U.S. at 398-99. Here, perhaps is the first pitched argument in the United States Supreme Court over judicial restraint.
> Furthermore, it may be open to question whether the Chase aphorism is as immutable as property rights absolutists would have it. Justice Holmes once wrote:
> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail.
> *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 355, 28 S.Ct. 529, 52 L.Ed. 828 (1908). Moreover: "In the last analysis nearly every law transfers something from A to B. It matters not whether this advantage be tangible or fancied, large or small. Somebody gains, somebody loses, for you cannot create an advantage out of a vacuum. This makes the whole question one of degree, and there is no principle, no fundamental right, in a matter of degree." r. Luce, Legislative Problems 60 (1935, reprinted 1971) *quoted in* frank R. Strong, Substantive Due Process of Law: A Dichotomy of Sense and Nonsense 172 (1986).

Although there can be little argument in justification of the idea the government may arbitrarily take your private property and give it over to someone else's private use (as opposed to public use), Chase's aphorism has been employed on occasion to pernicious effect. For example, in ***402** invalidating New York's pioneering worker's compensation law, the New York Court of Appeals gave as one of the invalidating reasons the requirement for employers to pay premiums into the fund to pay injured workers was "taking the property of A. and giving it to B., and that cannot be done under our Constitutions." *Ives v. S. Buffalo Ry. Co.,* 201 N.Y. 271, 94 N.E. 431, 440 (1911).
By contrast, that same ****211** year our predecessors on this Court, true to their Progressive Era and Populist roots, rejected similar property rights

arguments to become the first court in the country to uphold the constitutionality of worker's compensation legislation. *See State v. Clausen,* 65 Wash. 156, 184-88, 117 P. 1101 (1911) (" '[I]t is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use.' " (quoting *Noble State Bank v. Haskell,* 219 U.S. 104, 110, 31 S.Ct. 186, 55 L.Ed. 112 (1911) (Holmes, J.)).[FN7]

> FN7. We addressed New York's contrary *Ives* decision directly in *Clausen::*
> We shall offer no criticism of the opinion. We will only say that notwithstanding the decision comes from the highest court of the first state of the Union, and is supported by a most persuasive argument, we have not been able to yield our consent to the view there taken.
> We conclude, therefore, that the act in question violates no provision of either the state or Federal constitutions, and that the auditor should give it effect. Let the writ issue.
> *Clausen,* 65 Wash. at 212, 117 P. 1101. Constitutional convention leader, Chief Justice Dunbar, signed the majority opinion. Only Justice Chadwick dissented in *Clausen,* but not on the property rights issue.

Against that background, we turn to Washington's constitutional provision, "Private property shall not be taken for private use." That is plain enough, but that is not all the first sentence of art. I, § 16 says. The remainder of the sentence goes on to say private property *may* be taken for private use "for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes." But isn't this taking private property from *A* and giving it to *B* for private use? Doesn't this provision in our state constitution violate the Fourteenth Amendment per *Missouri Pacific Railway?* ***403** The answer to the first question is yes; the answer to the second question is no.

We considered these very questions in *Mountain Timber Co. v. Superior Court of Cowlitz County,* 77 Wash. 585, 137 P. 994 (1914). Mountain Timber wanted to condemn land belonging to another for use as a logging road. There was no outlet for the company's timber other than over the land of the respondent. *See id.* at 586, 137 P. 994. A 1913 statute enacted pursuant to art. I, § 16's exception for private ways of necessity allowed as much:
"An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity ... may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, ... The term 'private way of necessity,' as used in this act, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.

Mountain Timber, 77 Wash. at 586, 137 P. 994 (quoting Laws of 1913, at 412). The statute provided for compensation for the condemnation. *See id.* Nevertheless, the owner of the property resisted the condemnation by demurrer, and the trial court refused to permit the condemnation. *See id.*

In a unanimous opinion authored by Justice Gose, we began with a "recurrence to certain fundamental principles," noting " 'the power of eminent domain is not a reserved, but an inherent right, a right which pertains to sovereignty as a necessary, constant and inextinguishable attribute.' " *Id..* at 587, 588, 137 P. 994 (quoting 1 john Lewis, Eminent Domain § 3 (3d ed.1909)).[FN8] After saying the power of ***404** eminent domain is an inherent attribute of sovereignty, we carefully corrected a misstatement in an earlier case that art. I, § 16 *grants* the right to take private property****212** for private use. Not so, we said. The proper way to look at it is that the State, as the sovereign, has the inherent power to condemn *any* land for *any* use, and that art. I, § 16 carves out a constitutional exception regarding

private use. Art. I, § 16 simply excludes private ways of necessity from the exception for private use. *See Mountain Timber,* 77 Wash. at 590, 137 P. 994. Thus, the challenged statute did nothing more than provide a procedure for what the State had the inherent authority to do.

> FN8. "This power, denominated the *eminent domain* of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise." *West River Bridge Co. v. Dix,* 47 U.S. (6 How.) 507, 532, 12 L.Ed. 535 (1848).

With respect to the federal constitutionality of the statute, we said: "The taking of private property for private use for the promotion of the general welfare, upon due notice and hearing and the payment of compensation,[FN9] is not incompatible with due process of law, as guaranteed by the Federal constitution." *Id.* at 592, 137 P. 994 (citing *Head v. Amoskeag Mfg. Co.,* 113 U.S. 9, 5 S.Ct. 441, 28 L.Ed. 889 (1885). The "general welfare" we referred to existed because the road "prevents a private individual from bottling up a portion of the resources of the state." *Mountain Timber,* 77 Wash. at 590, 137 P. 994. The Court of Appeals for the Ninth Circuit later affirmed the constitutionality of the statute under the Fourteenth Amendment in *Ruddock v. Bloedel Donovan Lumber Mills,* 28 F.2d 684, 687 (9th Cir.1928).

> FN9. The 1913 statute provided compensation for the taking of private ways of necessity. *Mountain Timber,* 77 Wash. at 586, 137 P. 994.

To summarize the foregoing discussion, we know, pursuant to the Ninth Circuit's strong statement in *Armendariz,* the taking of private property for private use violates Fourteenth Amendment due process under federal jurisprudence. We also know under wash. constT. art. I, § 16, the government *may* take private property for private use so long as the taking promotes the general welfare and compensation ***405** is paid, and that such a taking does *not* violate Fourteenth Amendment due process.[FN10] Consequently, one can hardly agree with the majority that our state constitution provides greater protection for private property than the federal constitution. At the very least, the two constitutions provide similar protection. The taking of private property for private use that occurred in *Mountain Timber* received validation both in Washington's Supreme Court and the Court of Appeals for the Ninth Circuit.

> FN10. "This court has repeatedly held that ch. 133, Laws of 1913, p. 412, here drawn in question, is not violative of any rights guaranteed by the state or federal constitution." *Huntoon v. King County,* 145 Wash. 307, 313, 260 P. 527 (1927).

2. No Taking of Property Occurred Here.

As the majority correctly points out, under either the Fifth Amendment or art. I, § 16, in order for a taking to occur, government must take a citizen's property. Thus, the first task in any taking analysis is to identify what property, if any, is involved. The majority identifies two species of property, a right of first refusal and the right to dispose of property, but unfortunately conflates its assessment of the two, leading to analytical confusion. The majority discusses the right of first refusal and treats it as equivalent to a fundamental attribute of property, the right to dispose of it. But the majority fails properly to characterize the nature of a right of first refusal.

The majority says the right of first refusal in the hands of the property owner is a valuable property right. Justice Johnson correctly points out this so-called right is not a property right susceptible to a takings analysis.

Properly analyzed, what the park owners claim the statute unconstitutionally took from them is their alleged right to sell their mobile home parks in any manner they might choose to whomever they might

choose.

Until today, we have interpreted art. I, § 16 and the Fifth Amendment as essentially coextensive. *Highline Sch. Dist. No. 401 v. Port of Seattle,* 87 Wash.2d 6, 11, 548 P.2d 1085 (1976); ***406***Orion Corp. v. State,* 109 Wash.2d 621, 657-58, 747 P.2d 1062 (1987), *cert. denied,* 486 U.S. 1022, 108 S.Ct. 1996, 100 L.Ed.2d 227 (1988). Because the majority offers no sustainable reason why we should not continue to do so, its singular excursion into regulatory taking law, which has no parallel anywhere and in fact directly ****213** contradicts all United States Supreme Court decisions on regulatory takings, is difficult to follow or support. The proper course, which we followed in *Guimont,* is to continue to apply the ample, well-established federal law of regulatory takings.

In *Guimont,* we adopted the United States Supreme Court's formulation for a facial taking. Neither the park owners nor the majority relies on this test for authority, of course, because they simply cannot show the challenged statute fails any aspect of the *Guimont* test.

First, a taking may be present where there is a physical invasion of the property by government. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) ("a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."). Obviously, no such physical invasion occurs as a result of the challenged statute in this case.

Second, a taking may be present if the action of the government in regulating the uses that can be made of the property denies the landowner all economically viable use of the property:
... [T]o succeed in proving that a statute on its face effects a taking by regulating the uses that can be made of property, the landowner must show that the mere enactment of the statute denies the owner of all economically viable use of the property.

Guimont, 121 Wash.2d at 605, 854 P.2d 1 (footnote omitted). As the Supreme Court explained in *PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 84, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), to establish a constitutional taking, a property owner must prove the rights lost were "so essential to the use or economic value of [the] property that [a] state-authorized ***407** limitation of it amounted to a 'taking'." *See also Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1018, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 119 S.Ct. 1624, 1644, 143 L.Ed.2d 882 (1999) (holding determination of deprivation of all economically viable use is a jury question). Again, park owners in this case cannot demonstrate such a total taking of property by governmental regulation occurred, in any sense.[FN11]

> FN11. Justice Rehnquist, writing in *PruneYard,* a case involving the right to exclude others from one's property, said: " here appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.' " *PruneYard,* 447 U.S. at 84, 100 S.Ct. 2035 . Thus, even the hallowed right to exclude others is not an absolute right permitting no incursion but is subject to a balancing of interests. The majority here does no balancing whatsoever.

Finally, a taking by enactment of a statute or regulation can be demonstrated when the government action destroys or derogates a fundamental attribute of ownership. *Guimont,* 121 Wash.2d at 602, 854 P.2d 1.[FN12] *Guimont* indicates a taking cannot be found unless a fundamental attribute of ownership is actually *destroyed* or *derogated.* The term "destroyed or derogated" has been discussed in several Washington cases. *See Presbytery of Seattle v. King County,* 114 Wash.2d 320, 329-30, 787 P.2d 907 ("court[s] should ask whether the regulation destroys one or more of the fundamental attributes of ownership"), *cert. denied,* 498 U.S. 911, 111 S.Ct. 284, 112 L.Ed.2d 238 (1990); *Sintra, Inc. v. City of Seattle,* 119 Wash.2d 1, 14 n. 6, 829 P.2d 765 ("regulation may also be a taking if it destroys

one or more of the fundamental attributes of property ownership"), *cert. denied,* 506 U.S. 1028, 113 S.Ct. 676, 121 L.Ed.2d 598 (1992); *Robinson v. City of Seattle,* 119 Wash.2d 34, 50, 830 P.2d 318 ("we ask whether the regulation destroys or derogates any fundamental ***408** attribute of ownership"), *cert. denied,* 506 U.S. 1028, 113 S.Ct. 676, 121 L.Ed.2d 598 (1992); *see also* ****214** *Margola Assocs. v. City of Seattle,* 121 Wash.2d 625, 643, 854 P.2d 23 (1993) ("court first asks whether the challenged regulation destroys one or more fundamental attributes of property ownership"). The majority blithely asserts because the Act " destroys or derogates" a fundamental attribute of ownership, it is a taking. The majority's assertion is superficial and far too simplistic. As Justice Oliver Wendell Holmes so aptly said, "General propositions do not decide concrete cases." *Lochner v. New York,* 198 U.S. 45, 76, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting), *overruled in part on other grounds by Day-Brite Lighting Inc. v. State of Mo.,* 342 U.S. 421, 72 S.Ct. 405, 96 L.Ed. 469 (1952).[FN13]

FN12. Although we said this in *Guimont,* the United States Supreme Court has never indicated that any regulation affecting any fundamental attribute of property is a per se facial taking. Rather, the Court has first concluded that a physical invasion, for instance, is a categorical taking because the right to exclude others is one of the most essential sticks in the bundle of rights concerning property. Thus, simply labeling something a fundamental attribute of property does not automatically mean its deprivation is a categorical taking.

FN13. One scholar has described attempts to determine when regulation goes so far that it becomes a taking as the "lawyer's equivalent of the physicist's hunt for the quark." charles Haar, Land-Use Planning 766 (3d ed.1976).

First, "[i]t is true that not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Armstrong v. United States,* 364 U.S. 40, 48, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). *Accord Eastern Enters. v. Apfel,* 524 U.S. 498, 118 S.Ct. 2131, 2146, 141 L.Ed.2d 451 (1998) ("The party challenging the government action bears a substantial burden, for not every destruction or injury to property by such action is a constitutional taking."); *PruneYard,* 447 U.S. at 82, 100 S.Ct. 2035; *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 144, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Alderwood Assocs. v. Wash. Council,* 96 Wash.2d 230, 251, 635 P.2d 108 (1981) (Dolliver, J., concurring). Even the intellectual father of the modern property rights movement, Professor Richard A. Epstein, has written, "But government restraint on property does not necessarily violate the Constitution as a deprivation of property rights. Even if left uncompensated, such restraints could well be justified under the state's police power." Richard A. Epstein, *Lest We Forget:* Buchanan v. Warley *and Constitutional Jurisprudence of the " Progressive Era,"* 51 vand. L.Rev.. 787, 789 ***409** (1998). In other words, simply concluding a regulation affects some fundamental attribute of property initiates the inquiry, rather than ends it, as the majority opinion would have it. The inquiry into when a regulatory taking exists has assumed many forms. A study of each of them demonstrates conclusively the absence of a taking here.

a. The Holmes Test

In the famous case, *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922), Justice Holmes wrote: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The first part of this sentence, "property may be regulated to a certain extent," is often overlooked. It means the police power may legitimately regulate property. As Justice Antonin Scalia, writing for the majority 70 years later said: "It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1027, 112 S.Ct.

2886, 120 L.Ed.2d 798 (1992). [FN14] Thus, ****215** *regulation* of property is not forbidden. The question ***410** as Holmes posed it is when does a regulation go so far as to constitute a taking: "For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort [rent control] pressed to a certain height might amount to a taking without due process." *Block v. Hirsh,* 256 U.S. 135, 156, 41 S.Ct. 458, 65 L.Ed. 865 (1921) (upholding District of Columbia rent control law).

> FN14. Justice Scalia's comment echoes the famous and oft-quoted statement by Chief Justice Lemuel Shaw in 1851:
> We think it a well settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, not injurious to the rights of the community.
> All property in this commonwealth ... is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare.
> Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.
> *Commonwealth v. Alger,* 61 Mass. (7 Cush.) 53, 84-85 (1851). *Accord State v. Dexter,* 32 Wash.2d 551, 558, 202 P.2d 906 (1949) (quoting with approval); *State v. Van Vlack,* 101 Wash. 503, 509, 172 P. 563 (1918) (quoting with approval).
> Justice Joseph Story wrote: "All the property and vested rights of individuals are subject to such regulations of police as the legislature may establish with a view to protect the community and its several members against such use or employment thereof as would be injurious to society or *unjust toward other individuals.*" 2 joseph Story, Commentaries on the Constitution of the United States § 1954, at 700-01 (5th ed. 1891) (emphasis added) (quoting *Commonwealth v. Alger* with approval).

The determination of when a regulation goes "too far" is necessarily a substantive judgment. The object of the "too far" inquiry is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 199, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Here, the effect of the challenged Act is negligible. A park owner must simply give the park tenants notice of an impending sale and accept their offer if it equals the first offer. The park owner is financially as well off as if the statute were not in effect. By any test imaginable, other than an absolute prohibition against any regulation of property, the statute in the present case does not go too far.

b. The *Armstrong* Test

Justice Black said in *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960), "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The Supreme Court has lately referred to this statement as an expression of the Fifth Amendment's "concern[ ] for proportionality." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 702, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). ***411** Thus, the question of whether a regulation effects a taking "necessarily requires a

weighing of private and public interests." *Agins v. City of Tiburon,* 447 U.S. 255, 261, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

In the balance here, is the park owners' wish to sell the park free of the right of first refusal the statute gives the park tenants balanced against the devastating economic and social consequences of the sale of a mobile home park on its tenants. Justice Black used the phrase "in all fairness and justice." What fairness or justice is there in the majority's assertion that a month's delay in a park owner's ability to sell is more important than the fates of the park tenants? Park tenants who because of the sale become homeless create new burdens for the people of Washington. To avoid these harsh results, the Legislature voted unanimously to give the park tenants a chance to remain in their homes by buying the park. The Legislature imposed a minimal obligation on the park owner-to forbear for 30 days to give the tenants a chance to buy the park. That minimal obligation, compared to the severe effects and costs to society of displacing tenants, leads to the conclusion that the statute does not require the park owners to bear a burden out of proportion to the burden that ought to be borne by society as a whole.

3. Substantive Due Process

Petitioner Manufactured Housing Communities of Washington has not challenged the statute on substantive due process grounds, so there is no substantive due process question before the Court. But because analysis of an alleged taking under both the "too far" test and the *Armstrong* test involves substantive weighing determinations, it is helpful and instructive to look at how we might analyze this case under our substantive due process protocol.

We said in *Presbytery of Seattle,* 114 Wash.2d at 330, 787 P.2d 907:
****216** To determine whether the regulation violates due process, the court should engage in the classic 3-prong due process test and ***412** ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner. "In other words, 1) there must be a public problem or 'evil,' 2) the regulation must tend to solve this problem, and 3) the regulation must not be 'unduly oppressive' upon the person regulated." The third inquiry will usually be the difficult and determinative one.

(Footnotes omitted.) Applying that analysis here, it is easy to see the challenged statute has a legitimate public purpose: the avoidance of economic devastation and homelessness following the sale of a mobile home park. The statute plainly uses means reasonably necessary to achieve its goal: giving the park tenants a chance to buy the park would prevent their displacement. Finally, the third prong, consideration of whether the statute is unduly oppressive, can lead only to the conclusion it is not: the statute does not result in any financial detriment to the park owners whatsoever. Compared to the social and economic costs of displacement of park tenants, the trivial delay in the sale of a park the statute imposes can hardly be considered unduly oppressive.

4. The *Penn Central* Test

Twenty-one years ago in *Penn Central,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, the United States Supreme Court adopted an analytical protocol for assessing takings. In affirming a New York Court of Appeals decision upholding as against a regulatory taking challenge the City Landmarks Preservation Commission's denial of permission to build a 50-story office building over Grand Central Terminal, the Court noted its regulatory takings jurisprudence had not been based on fixed rules:
In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. *See* ***413***Goldblatt v.* [*Town of*] *Hempstead,* [369 U.S. 590, 594, 82 S.Ct.

987, 990, 8 L.Ed.2d 130 (1962)]. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, *see, e. g., United States v. Causby,* 328 U.S. 256[, 66 S.Ct. 1062, 90 L.Ed. 1206] (1946), *than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.*

Id. at 124, 98 S.Ct. 2646 (emphasis added). *Accord Eastern Enterprises,* 118 S.Ct. at 2146. Thus, to determine whether a regulatory taking has occurred, the United States Supreme Court looks to the character of the regulation, the economic impact on the landowner, and the extent of interference with investment-backed expectations. Until today, we have followed the *Penn Central* three-part balancing test. *Presbytery of Seattle,* 114 Wash.2d at 334, 787 P.2d 907. The majority offers no reason why we should now overrule *Presbytery* and *Guimont* and abandon the *Penn Central* test.

In any event, the park owners cannot meet the three-part *Penn Central* balancing test:

1. *Character of the Regulation.* Looking first to the character of the regulation, one can hardly deem it oppressive or burdensome. Unlike the statute we struck down in *Guimont,* the Act requires no financial contribution from the park owners. In fact, it may actually provide a benefit to the owners by helping improve the market for the mobile home park. A prospective third-party purchaser is more likely to offer a *higher* price for the park, knowing the home owners may match the offer. The statute, by providing notice to tenants and giving them a chance to bid the fair market value for a park, thus has the effect of promoting and encouraging a free and efficient market. An efficient market should work to the financial advantage of park owners.

****217** Moreover, the United States Supreme Court has repeatedly upheld regulations adjusting the benefits and burdens of economic life to promote the social good, even though those regulations may have destroyed or adversely affected ***414** property interests.[FN15] *See, e.g., Connolly v. Pension Benefit Guar. Corp.,* 475 U.S. 211, 225, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986) (provisions of Multi-Employer Pension Plan Amendments Act of 1980, requiring withdrawing employers to pay proportionate share of plan's unfunded vested benefits, did not violate Fifth Amendment taking clause); *Penn Cent. Transp. Co.,* 438 U.S. at 125, 98 S.Ct. 2646 (owners of historic building could not establish a taking merely by showing landmark preservation ordinance prevented them from exploiting airspace above the building); *City of Eastlake v. Forest City Enterps., Inc.,* 426 U.S. 668, 674, n. 8, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976) (" By its nature, zoning 'interferes' significantly with owners' uses of property. It is hornbook law that ' [m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning.' 8 E. McQuillin, Municipal Corporations § 25.44, p. 111 (3d ed.1965)."); *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 592, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (" Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."); *Vill. of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (zoning ordinances not unconstitutional takings).

FN15. "Under the ' character-of-the-regulation' prong of the regulatory takings analysis, '[a] "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the social good.' " *Thomas v. Anchorage Equal Rights Comm'n,* 165

F.3d 692, 709 (9th Cir.1999) (quoting *Penn Cent.,* 438 U.S. at 124, 98 S.Ct. 2646). As previously noted, no physical invasion is occasioned by the Act.

As the Supreme Court said in *Connolly,* 475 U.S. at 223, 106 S.Ct. 1018:
***415** In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

But the majority's new approach to takings would appear to hold *any* effect on a use of property by a governmental regulation is sufficient to meet this prong of the test. While there is at least some superficial attraction to the park owners' assertion they have the right to sell their own property to anybody they might want to sell it to for whatever beneficial or whimsical or even capricious reason that occurs to them, our law has never said the right to dispose of property is so fundamental as to be an unfettered right. Such a view is entirely unsupported in our law.

Washington law limits the disposition of property in a legion of ways. [FN16] A person ****218** may legally own a large supply of bottled liquor, but cannot go into a retail business to sell it in Washington because liquor sales are permitted only at state-run stores under the authority of the Liquor Control Board. A person may have a license to sell liquor at a restaurant or bar, but cannot sell liquor between the hours of 2:00 a.m. and 6:00 a.m. WAC 314-16-050. We have long upheld the authority of the Liquor Control Board to set the hours of operation of establishments that sell liquor. ***416** *State ex rel. Thornbury v. Gregory,* 191 Wash. 70, 70 P.2d 788 (1937). Such prohibitions and restrictions on liquor sales survived takings challenges as long ago as 1877. *See, e.g., Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (upholding Kansas statute prohibiting sale of alcoholic beverages as against a takings challenge based on the loss of value of property devoted to beer production).

FN16. *See, e.g.,* RCW 9.46.310 (unlawful to sell gambling devices without a license); RCW 15.08.070 (unlawful to sell certain by-products of infected fruits and vegetables); RCW 15.13.390 (unlawful to sell horticultural plants that do not meet certain requirements); RCW 15.36.031 (unlawful to sell milk without license); RCW 15.37.030 (unlawful to sell milk that is not Grade A); RCW 15.54.400 (superphosphate containing less than 18 percent available phosphoric acid may not be sold in Washington); RCW 16.49.075 (unlawful to sell uninspected meat); RCW 16.49A.350 (horse carcasses may not be sold unless properly labeled); RCW 32.32.110 (capital stock of mutual savings bank owned by directors and officers may not be sold within three years of purchase); RCW 33.48.180 (savings and loan association may not sell stock without authorization); RCW 70.74.020 (explosives cannot be sold unless in compliance with law). In each of these instances, State law places a restriction or prohibition on the disposition of items otherwise legal to own.

A person certainly has no right to sell tobacco products to whomever he or she wishes. It is a gross misdemeanor in Washington to sell tobacco products to those under 18. RCW 26.28.080. This statute, carrying a criminal penalty for its violation, is in derogation of one's right to dispose of one's property. Would the majority declare it a taking for that reason? If not, how would the majority distinguish its holding here?

One may legally own a cache of firearms, but cannot sell them free of an armada of federal and state laws. *See* 18 U.S.C. § 921 (firearms); RCW 9.41.110 (unlawful to sell pistols without a license); RCW 9.41.190 (unlawful to sell machine guns and

short-barreled shotguns). Would the majority declare these laws takings and facially unconstitutional derogations of one's right to dispose of property?

Our antidiscrimination law specifically and in no uncertain terms limits the right of a property owner to dispose of property in any way he or she may desire. RCW 49.60.030(1) bars discrimination in real estate transactions. RCW 49.60.222 declares it to be an unfair practice for any person, whether acting for himself, herself, or another, to discriminate "because of sex, marital status, race, creed, color, national origin, families with children status, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person[.]" Unfair practices include refusing to engage in a real estate transaction, refusing to negotiate for a real estate transaction, misrepresenting the availability of real property for sale or rental, and expelling a person from real property, with heavy civil penalties for violations enumerated at section .225. Of particular note is the ***417** prohibition against expelling someone from occupancy of real property for discriminatory reasons. RCW 49.60.222(1)(i). This statute implicates the right to exclude others, another fundamental attribute of property. The remedy for these violations may be a *forced sale* to the discrimination victim. RCW 49.60.250(5). Under the majority's analysis, these antidiscrimination statutes are facially unconstitutional and void because they destroy or derogate the right to dispose of property. How would the majority distinguish its holding here?

All zoning laws would be abrogated under the majority's analysis as well because they interfere with the possession and use of private property.

The majority chooses to consider each stick in the bundle of sticks and concludes any effect on *any* aspect of property is a taking. It cites *Ackerman v. Port of Seattle,* 55 Wash.2d 400, 409, 348 P.2d 664 (1960), for the following proposition: [FN17]

> FN17. The quote *Ackerman* used was from a *1921* Texas case, *Spann v. City of Dallas,* 111 Tex. 350, 235 S.W. 513 (1921). The quote speaks of the "unrestricted right of use" of property. A "right" to use property without restriction obviously trumps zoning laws. It may be that *Spann* was the law of Texas in 1921 and forbade zoning laws. But *Spann* came before the landmark decision upholding the constitutionality of zoning laws, *Vill. of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), and prior to the 1927 passage of legislation in Texas giving cities the power to enact zoning ordinances. *See Price v. City of Junction,* 711 F.2d 582, 588 (5th Cir.1983) , for a discussion of *Spann.* We upheld the constitutionality of zoning ordinances 47 years ago in *State ex rel. Miller v. Cain,* 40 Wash.2d 216, 218, 242 P.2d 505 (1952) ("Zoning ordinances are constitutional in principle as a valid exercise of the police power[,]" citing *Village of Euclid.*). For a majority of this Court to reintroduce *Spann* into our cases brings into question the constitutional validity of all Washington zoning laws, the Growth Management Act, the Shorelines Management Act, the State Environmental Policy Act, and every other statute that in any way derogates the so-called "unrestricted right of use" of property. The *Spann* quote, if taken as the law of Washington, would have a pernicious and devastating effect on decades of Washington land use regulations. We should extirpate it from our case books rather than repeat it here.

****219** "Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use ***418** be denied, the value of the property is annihilated and ownership is rendered a barren right."

The majority's analysis is further flawed because there is no such thing in Washington as an "

unrestricted right of use" of property, and there never has been. We said in *State v. Lawrence,* 165 Wash. 508, 517, 6 P.2d 363 (1931), "All property is held subject to such restraints and regulations as the state may constitutionally make in the exercise of its police power." FN18

> FN18. "It is, we believe, the universally accepted view that all property is derived from society." *Mountain Timber,* 77 Wash. at 592, 137 P. 994. To illustrate the necessity for a societal framework in order for rights to property to exist, consider the statute at bar, RCW 59.23.030 , setting forth the sanction for failure to comply with the act: "If the court determines that the notice provisions of this chapter have been violated, the court shall issue an order setting aside the improper sale." How would such an order operate?
> Surely, as an order affecting real property, someone would record the order with the county auditor, where it would appear with the description of the relevant parcel. The order setting aside the improper sale would effectively reconvey the land to the park owner because the improper conveyance would no longer be of record. This means the purported purchaser would be unable to enforce any rights to the property. He could not seek assistance from the sheriff to "exclude others" because he could not establish the land belonged to him in the absence of society's recognition of the conveyance. He could not sell the land because he would find no buyers for land he could not show clear title to. He could not enforce collection of rents from the mobile home tenants because in order to do so, he would have to set forth in a complaint that he is the landlord entitled to the rents, and while he may allege as much, he can never prove he is the landlord because there is no record of his ownership the law recognizes as valid. In such a case, while there may have been a valid contract for the sale of land between a willing seller and a willing buyer, without society's imprimatur, no cognizable conveyance of title occurred.

Moreover, the United States Supreme Court has never allowed property in takings cases to be assessed in a disaggregated sense and has never accorded "essential" status to the fundamental attribute of property asserted in this case, the right to dispose of property. In a seminal case that ought to be dispositive of the issue here, *Andrus v. Allard,* 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), the Court considered a federal statute that prohibited commercial transactions in parts of birds legally killed before the birds came under the protection of the Bald Eagle Protection Act, 16 U.S.C. § 668(a).

The issue reached the Court on the petition of persons ***419** engaged in the trade of Indian artifacts. They had in their possession for the purpose of sale at the time the Act went into effect artifacts partly composed of feathers from protected birds. They argued the enactment deprived them of property without just compensation because they could no longer sell the artifacts for profit.

The Court rejected the argument. At the outset, the Court noted:
[G]overnment regulation-by definition-involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel government to regulate by purchase.

Andrus, 444 U.S. at 65, 100 S.Ct. 318 (emphasis omitted). The Court recognized the Act placed a " significant restriction" on the owners' right to dispose of the artifacts. But this was not enough:[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ****220** "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Id. at 65-66, 100 S.Ct. 318. Thus, the Court

concluded, the Act did not effect a taking, because even though the artifact owners could no longer sell the artifacts, they "retain the rights to possess and transport their property, and to donate or devise the protected birds." *Id.* at 66, 100 S.Ct. 318. [FN19]

> FN19. The right to dispose of property as a fundamental aspect of property ownership has no firm grounding in Anglo-American law. The noted historian, Forrest McDonald, has observed: "But the crucial fact is that ownership did not include the absolute right to buy or sell one's property in a free market; that was not a part of the scheme of things in eighteenth-century England and America." forrest McDonald, Novus Ordo Seclorum, The Intellectual Origins of the Constitution 14 (1985).

The situation in *Andrus* parallels the situation in the present case, except the effect on the park owners is less onerous because the challenged statute does not destroy ***420** their right to sell, as in *Andrus;* it merely restricts and conditions sale for a short period of time. But the park owners retain every other right of ownership to their property: the right to possess it; the right to use it; the right to manage it; the right to income from it; the right to consume or destroy it at the conclusion of the leasehold terms; the right to modify it; the right to devise it. *See* Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law,* 25 B.C. Envtl. Aff. L.Rev. 347, 375 (1998) (discussing the rights to property). Pursuant to *Andrus,* there is no taking in this case where the interference to rights to ownership is so minimal compared to the full panoply of ownership rights the park owners retain.

Other Supreme Court cases in addition to *Andrus* inveigh against disaggregating property rights-considering only single sticks from the bundle-and hold the proper approach is to consider the effect of a regulation on the property as a whole: " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 130, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 498, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). In a more recent case, *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.,* 508 U.S. 602, 644, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993), the Court said a "parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." That is also the law of Washington: "Similarly, our own state case law demonstrates that a regulatory scheme's economic impact is to be determined by viewing the full bundle of property rights in its entirety." *Presbytery of Seattle,* 114 Wash.2d at 335, 787 P.2d 907 (quoting *Penn Cent.* and citing Washington cases). Thus, until today, Washington takings jurisprudence has looked to the ***421** entirety of the property allegedly taken, not just to one stick in the bundle of property rights. The majority opinion changes that principle without acknowledging what it is doing or justifying the change.

If we did not look at the effect of a regulation on property in its entirety, *every* land use restriction could be disaggregated from the entirety of the property and challenged as a taking. Examples would include the diminution in value from side yard and setback requirements on individual lots. " A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area." *Keystone,* 480 U.S. at 498, 107 S.Ct. 1232.[FN20]

> FN20. Even if such disaggregation of sticks from the bundle were a permissible mode of analysis, the majority's approach would fail to establish a facial taking. Diminution in property value, standing alone, does not establish a "taking." *Penn Cent.,* 438 U.S. at 131, 98 S.Ct. 2646 (citing cases).

In summary, the character of the regulation here challenged is in the mainstream of regulation that has been constitutionally permissible**221 for most of the twentieth century. There is nothing novel or oppressive enough about the Act to suggest the character of the regulation here fails constitutional muster.

2. *Economic Impact on the Owner.* Because this case is a facial taking claim, there is no evidence in the record of economic impact. As discussed above, however, a regulation that has no economic effect other than to create the potential for a bidding war over the sale of a mobile home park, thereby assuring a sale at fair market value, can hardly work to a park owner's economic disadvantage.

3. *Interference with Investment-Backed Expectations.* This inquiry typically arises in the downzone context, where a jurisdiction might attempt to downzone property from a more intensive use, and therefore more lucrative use, to a less intensive use, such as a change from industrial or commercial to single-family residential or park. We addressed a like issue in *Estate of Friedman v. Pierce County,* 112 Wash.2d 68, 78-79, 768 P.2d 462 (1989) (quoting *422 Junji Shimazaki, Comment, *Land Use Takings and the Problem of Ripeness in the United States Supreme Court Cases,* 1 B.Y.U. J. Pub.L. 375, 381-82 (1987)):

> Unlike eminent domain proceedings where the government actually acquires fee title, land use regulations only limit actual or potential use and enjoyment of private property. Consequently, when land use ordinances are challenged, courts must ascertain the remaining value of the regulated property to determine the amount of economic impact caused by the regulation. This is done largely by determining what remaining use of the property the ordinance permits. If substantial use remains, the amount of diminution in value or the effect upon the reasonable investment-backed expectations of the landowner are normally not significant enough to warrant a takings judgment. If, on the other hand, nearly all uses are depleted, a taking under the fifth amendment may exist.

One cannot easily detect *any* interference with investment-backed expectations brought about by the challenged statute in this case, let alone such a reduction in the value of a mobile home park that " nearly all uses are depleted[.]"

In summary, under all of the United States Supreme Court's tests for a taking, tests we have also adopted in *Guimont,* there is no taking here.[FN21] The Act permits the park **222 owners to continue to use their property exactly as *423 they had been using it, both as to rents and profits, and as to possible capital gains upon sale. As Justice Holmes noted: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pa. Coal,* 260 U.S. at 413, 43 S.Ct. 158. Here, where there is not even a diminution in value, there can be no taking.

> FN21. I note, however, the majority's belief "a taking has occurred in this case not only because an owner is deprived of a fundamental attribute of property, but also because this property is statutorily *transferred.*" (Court's emphasis.) Majority op. at 194. The majority improperly conflates the prohibition of taking with the prohibition of taking for a private use. If there is no taking in the first place, as the foregoing discussion demonstrates, one cannot create a taking out of thin air by arguing what is taken has been taken for private use. Logically, there is no need to reach the question of private versus public use if there has been no constitutionally cognizable taking in the first instance.
>
> But even assuming the majority is correct in reaching the private versus public use question, its disposition of this case would invalidate, for instance, our Minimum Wage Act (MWA), chapter 49.46 RCW, because the requirement to pay minimum wages is the taking of private property (the money of an employer) and transferring it for private use to employees. The constitutionality of the federal minimum wage law, the Fair Labor Standards Act (FLSA), has been settled since *United*

States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, 312 U.S. 657 (1941). Washington's MWA survived a constitutional challenge and has been settled law since 1960. *Peterson v. Hagan,* 56 Wash.2d 48, 351 P.2d 127 (1960). Neither the FLSA nor the MWA would survive the majority's approach. Lest there be any mistake in this regard, Professor Richard A. Epstein has written: " Restrictions on hours or wages are without question limitations upon the power of the employer to dispose of property." richard A. Epstein, Takings 280 (1985). How will the majority distinguish its holding here?

Likewise, many zoning ordinances are for the benefit of private parties. Consider, for instance, an area zoned for single-family residences. Suppose a particular homeowner wished to dismantle his house and build a 24-hour convenience store on his property. Such a commercial use would obviously increase the value of his land greatly. It would also decrease the value of homes in the immediate vicinity of the proposed convenience store, because resulting continual traffic, noise, and parking lot lights at all hours of the day and night would make it unpleasant to live there. The zoning ordinance would forbid such a commercial enterprise in a single-family residential neighborhood, of course. But the owner wishing to build the convenience store could claim the zoning ordinance diminished the value of his land solely for the private benefit of his neighbors. Under the majority's analysis, the zoning ordinance would be a forbidden taking of private property for private use.

CONCLUSION

Every member of the Washington State Senate and House of Representatives, regardless of partisan or philosophical persuasion, in compassionate recognition of the plight of mobile home park tenants forced to move because of a sale of a mobile home park, enacted legislation to give tenants the opportunity to purchase mobile home parks at fair market value in the event owners wish to sell. The legislation restricts the park owner's right to sell for a limited period of only 30 days, and assures the park owner will receive fair market value by allowing the tenants to buy at a price the owner has already deemed acceptable.

Fundamentally, the statute effects no seizure or physical invasion of land, nor damage to land, requiring just compensation. Nor does the challenged statute involve permanent restrictions on the use of private property, as in the case of zoning. Purely and simply, this is a case involving an ***424** economic regulation that is within the power of government to enact. That the regulation happens to concern the sale of land is merely incidental, and does not transform this case into a takings case.

The majority's erroneous conclusion that any regulation of an attribute of property is a taking thrusts us into extraordinarily dangerous waters, broadening takings law in ways so wide-ranging and unconfined as to call into question innumerable, legitimate, necessary government actions. In effect, the majority would have us install the very principles of Referendum 48 the people of Washington *resoundingly rejected* in the 1995 general election. [FN22]

FN22. Laws of 1995, ch. 98, the so-called Private Property Regulatory Fairness Act, purported to require full compensation to property owners if a governmental entity regulated or took any "action, requirement, or restriction" limiting "the use or development [of] private property." Laws of 1995, ch. 98, §§ 4(2); 7(4). The voters rejected this legislation by a vote of 796, 869 to 544,788 (59 percent to 41 percent).

The majority's takings analysis has no principled limitation, and fundamentally affects every aspect of the police power granted to government under our Constitution. As early as *Conger v. Pierce County,* 116 Wash. 27, 35-36, 198 P. 377 (1921), we said:

It is easy to understand the principles upon which

the police power doctrine is based, but difficult to define in language its limitations. It is not inconsistent with nor antagonistic to the rules of law concerning the taking of private property for a public use. Because of its elasticity and the inability to define or fix its exact limitations, there is sometimes a natural tendency on the part of the courts to stretch this power in order to bridge over otherwise difficult situations, and for like reasons it is a power most likely to be abused. It has been defined as an inherent power in the state which permits it to prevent all things harmful to the comfort, welfare and safety of society. It is based on necessity. It is exercised for the benefit of the public health, peace and welfare. Regulating and restricting the use of private property in the interest of the public is its chief business. It is the basis of the idea that the private individual must suffer without other compensation than the benefit to be received by the general public. It does not authorize the taking ***425** or damaging of private property in the sense used in the constitution with reference to taking such property for a public use.
Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for ****223** the public use, but to conserve the safety, morals, health and general welfare of the public.

I fear the majority's analysis needlessly intrudes on the police power in untold ways affecting everything from social welfare law to public health rules to environmental and land use regulation.[FN23] The very imprecision ****224** of the majority's ***427** takings analysis invites innumerable challenges to important police power enactments. I believe the analysis of the Court of Appeals here was fundamentally correct and I would affirm the Court of Appeals' decision.

> FN23. The concurrence presents an aberrational view of the nature and extent of the police power that is reflective of libertarian fabulism rather than history and law. The concurrence quotes a publication of the libertarian "think tank," the Cato Institute, for the erroneous proposition that the police power is the ' " power to secure rights, through restraints or sanctions, not some general power to provide public goods.' " Concurrence at 197 (quoting Cato Handbook for Congress: Policy Recommendations for the 106th Congress 206 (Edward H. Crane & David Boaz, eds., 1999)). The usual formulation is that the police power is plenary, limited only by constitutional provisions. *See, e.g., Rhod-A-Zalea & 35th, Inc. v. Snohomish County,* 136 Wash.2d 1, 16 n. 1, 959 P.2d 1024 (1998) (police power regulations limited only by constitutional safeguards).
> Justice Sanders asserts the modern onset of police power regulation has caused the formerly limited exercise of government regulation to "erode from its point of origin." *Weden v. San Juan County,* 135 Wash.2d 678, 727, 958 P.2d 273 (1998) (Sanders, J., dissenting). The proposition is demonstrably incorrect. This libertarian version of American history is pure fable, as the notion of the police power as a " substantive limitation on governmental authority," *id.* (Sanders, J., dissenting), is inconsistent with history and constitutional law.
> One chief libertarian myth about government regulation is that America in the past was a golden age of laissez-faire, free market, antiregulatory government. Scholarly research and commentary, not to mention mere perusal of old statute books, demonstrate the pervasiveness of police power regulation in early times. William Letwin writes:
> Before the Civil War, the constitutional authority of the states to carry on any and every form of economic regulation was seldom questioned. And this acceptance was not for want of regulations to question.
> On the contrary, state and local governments set the prices to be charged by wagoners, wood sawyers, chimneysweeps, pawnbrokers, hackney carriages, ferries, wharfs, bridges, and

bakers; required licensing of auctioneers, retailers, restaurants, taverns, vendors of lottery tickets, and slaughterhouses; and inspected the quality of timber, shingles, onions, butter, nails, tobacco, salted meat and fish, and bread. This very incomplete list attest to an intention to exercise detailed control over the operation of markets, especially (though not only) those that have since been characterized as providing "public services" and those thought to be morally dubious because of association with usury, betting intoxication, or excessive jubilation.

William Letwin, *Economic Regulation, in* 2 encyclopedia of the American Constitution 603 (Leonard W. Levy & Kenneth L. Karst eds., 1996). In colonial America ' "virtually every aspect of economic life was subject to nonmarket controls." ' jonathan R.T. Hughes, The Governmental Habit: Economic Controls from Colonial Times to the Present 49 (1977), *quoted in* Harry N. Scheiber, *Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America,* 107 yale L.J. 823, 843 (1997). *See also* William J. Novak, *Common Regulation: Legal Origins of State Power in America,* 45 hastings L.J. 1061, 1076-79 (1994) (listing numerous examples of regulation of all aspects of life in early America).

In his dissent in *Weden,* to which Justice Sanders refers the reader in his present concurrence, he extols Justice T.L. Stiles, a member of Washington's constitutional convention and a justice of this Court from 1889 to 1895. Justice Sanders quotes with evident approval from a speech Stiles gave:

"Laws have been passed in one state and another abridging the right of contract, the right to sell merchandise, the right to labor upon public works, the right to labor more than a certain number of hours, the right to freely come and go, the right to pursue legitimate trades, and a mass of others.... [Legislators who support such legislation] hide in swarms, behind the newly coined phrase, "police power," and that other more venerable phrase, "the public welfare, " both of which, like "public policy," are often, if one may use such an expression, liveries of heaven stolen to serve the devil in."

Weden, 135 Wash.2d at 726, 958 P.2d 273 (Sanders, J., dissenting) (quoting C.S. Reinhart, *History of the Supreme Court of the Territory and State of Washington* 49-50 (n.d.)). Students of the *Lochner* era will recognize this rhetoric. The service of the devil Stiles was speaking about, of course, was the onset of Progressive Era legislation enacted to remedy the horrendous burdens working men and women faced in the early days of the Industrial Age. Stiles evidently thought such legislation the work of the devil.

Stiles refers to the right of contract as sacrosanct. This was the view advanced by those who, like Stiles, were opposed to maximum work hours laws like the eight-hour day. In 1911, the United States Supreme Court put the right-to-contract argument to rest:

[F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

Chicago, B. & Q.R. Co. v. McGuire, 219 U.S. 549, 566, 31 S.Ct. 259, 55 L.Ed. 328 (1911).

Justice Sanders presents Stiles' comments as evidence of the prevailing view in Washington near the time of our constitutional convention. History shows the views of Stiles, who left the Court in 1895, were aberrational and idiosyncratic,

not typical.

Manifestly, in the early years of Washington's existence, the scope of the police power extended far beyond the mere prevention of nuisance, and included a wide range of applications to public welfare. Perhaps the clearest and most powerful exposition of the police power from the early days of Washington's statehood is the following statement by Justice Chadwick:

Having in mind the sovereignty of the state, it would be folly to define the term.

To define is to limit that which from the nature of things cannot be limited, but which is rather to be adjusted to conditions touching the common welfare, when covered by legislative enactments. The police power is to the public what the law of necessity is to the individual. It is comprehended in the maxim *salus populi suprema lex.* It is not a rule, it is an evolution.

State v. Mountain Timber Co., 75 Wash. 581, 588, 135 P. 645 (1913), *aff'd* 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917). One hundred years of Washington jurisprudence reveal a much different view of the police power than what Justice Sanders presents. *See generally* Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights,* 75 Wash. L.Rev. 857 (2000).

APPENDIX

The following states have enacted laws to protect mobile home owners from abuse by mobile home park owners. In most cases, these laws are similar in nature to landlord-tenant legislation, but contain protective provisions specific to mobile home park conditions.

Alaska-alaska Stat. § 34.03.225 (Lexis 1998).

Arizona-Mobile Home Parks Residential Landlord and Tenant Act, ariz.Rev.Stat. Ann. §§ 33-1401 to 33-1492 (West 2000).

California-Mobilehome Parks Act, Cal. health & Safety Code §§ 18200-18700 (West 1992). The California Legislature declared the following conditions and rights of residents of mobile home parks:

The Legislature finds and declares that increasing numbers of Californians live in manufactured homes and mobilehomes and that most of those living in such manufactured homes and mobilehomes reside in mobilehome parks. Because of the high cost of moving manufactured homes and mobilehomes, most owners of manufactured homes and mobilehomes reside within mobilehome parks for substantial periods of time. Because of the relatively permanent nature of residence in such parks and the substantial investment which a manufactured home or mobilehome represents, residents of mobilehome parks are ***428** entitled to live in conditions which assure their health, safety, general welfare, and a decent living environment, and which protect the investment of their manufactured homes and mobilehomes.

Cal. Health & Safety Code § 18250 (West 1992).

Colorado-Mobile Home Park Act, colo.Rev.Stat. §§ 38-12-200.1 to 38-12-217 (Bradford 1999).

Connecticut-conn. Gen.Stat. Ann. § 21-70a (West 1994) (requires park owner to pay mobile home owners relocation expenses and compensatory payments when there is change in land use of mobile home park).

Delaware-Mobile Home Lots and Leases Act, tit. 25, ch. 70. Legislature found "emergency situation exists with respect to housing for Delaware citizens, many of them elderly, in mobile home parks intending to convert into multiple-unit usage." del.Code Ann. tit. 25, § 7101 (Michie 1989). *See* del.Code Ann. tit. 25, § 7108 (creating in tenants option to purchase park upon notice of intent by park owner to convert the use of the park).

Florida-Florida Mobile Home Act, tit. 20A, ch. 723. fla. Stat. Ann. § 723.071 (West 1988) gives

mobile home park tenants the ****225** right of first refusal on proposed sale of park.

Idaho-Mobile Home Park Landlord-Tenant Act, idaho Code §§ 55-2001 to 55-2019 (Michie 1994).

Illinois-Mobile Home Park Act, Ch. 210, ill. comp. Stat. AnnN. §§ 115/1-115/27 (West 1998). The Illinois Legislature declared in its statement of findings:
The General Assembly of Illinois finds: (1) that there is a serious housing shortage in this state; (2) that rising costs in the building construction field has seriously impeded the building of new housing, particularly for moderate and low income citizens; (3) that the existing housing stock is continuously depleted through demolition resulting from aging buildings, urban renewal, highway construction and other necessary public improvements; (4) that advances in the construction of mobile homes has significantly increased the importance of this mode of housing; (5) that through proper regulation and ***429** licensing mobile homes can contribute to the quality housing of Illinois citizens.

Id. § 115/1.

Iowa-Mobile Home Parks Residential Landlord and Tenant Act, iowa Code Ann. §§ 562B.1-562B.32 (West 1992).

Kansas-Mobile Home Parks Residential Landlord and Tenant Act, kan. Stat. Ann. §§ 58-25,100 to 58-25, 126 (1994).

Kentucky-Mobile Home and Recreational Vehicle Park Act of 1972, ky.Rev.Stat. Ann. §§ 219.310 (Michie 1995).

Maine-me.Rev.Stat. Ann. tit. 10, §§ 9091-9100 (West 1997). section 9094-A requires 45-day notice to tenants prior to owner's executing purchase and sale agreement.

Maryland-md. Ann.Code Real Prop. § 8A-101 (Michie 1996).

Massachusetts-mass. Gen. Laws Ann. Ch. 140, §§ 32F-32S (West 1998). Section 32R establishes the right of first refusal for tenants.

Michigan-Mobile Home Commission Act, mich. Stat. Ann. § 19.855(128) (Lexis 1998).

Minnesota-minn.Stat. Ann. § 327C.095 (West 1995) requires payment of relocation costs if park is to convert to other use or close.

Montana-Residential Landlord and Tenant Act of 1977; mont.Code Ann. § 70-24-436(2) (West 1999) requires notice to tenants for proposed change in use of park.

Nebraska-Mobile Home Landlord and Tenant Act, neb.Rev.Stat. Ann. §§ 76-1450 to 76-14, 111 (1996).

Nevada-nev.Rev.Stat. Ann. § 118B.010 (1999).

New Hampshire-n.H.Rev.Stat. Ann. § 205-A:21 (1989) (requiring 60 days' notice to tenants before owner may accept offer to buy or transfer park; requires owners to consider in good faith offers from tenants to purchase).

New Jersey-n.J. Stat. Ann. §§ 46:8C to 46:8C-21 (West 1999). section 46:8C-11 gives right of first refusal to tenants.

***430** New Mexico-n.M. Stat. Ann. §§ 47-10-2 to 47-10-20 (Michie 1998).

New York-n.Y. Real Prop. tit. 49, § 233 (McKinney 1989).

North Carolina-n.C. Gen. Stat. § 42-36.1 (1999).

North Dakota-n.D. Cent.Code § 23-10-01 (Michie 1999).

Ohio-Page's ohio Rev.Code Ann. tit. 37, §§ 3733.09 -3733.20 (1997).

Oregon-or. Rev. Stat. Ann. §§ 446.003-446.547 (Lexis Supp.1998).

Pennsylvania-pa. Cons.Stat. Ann. tit. 68, §§ 398.1-398.11 (West 1998). "The purpose of this

legislation is to give special protection to mobile home owners in mobile home parks." *Malvern Courts, Inc. v. Stephens,* 275 Pa.Super. 518, 419 A.2d 21, 23 (1980).

Rhode Island-r.I. Gen. Laws § 31-44-3.1 (1994) grants right of refusal to tenant associations in mobile home parks.

South Carolina-Manufactured Home Park Tenancy Act, s.C.Code Ann. tit. 27, §§ 27-47-10 to 27-47-620 (West Supp.1999).

Utah-Mobile Home Park Residency Act, utah Code Ann. §§ 57-16-1 to 57-16-51.1 ****226** (Michie 1994). The Utah State Legislature declared:
The high cost of moving mobile homes, the requirements of mobile home parks relating to their installation, and the cost of landscaping and lot preparation necessitate that the owners of mobile homes occupied within mobile home parks be provided with protection from actual or constructive eviction.

utah Code Ann. § 57-16-2.

Vermont-vt. Stat. Ann. tit. 10, §§ 6201-6266 (Michie 1997). vt. Stat. Ann. tit. 10, § 6242 grants right of first refusal to tenants and requires owner negotiate in good faith.

Virginia-manufactured Home Lot Rental Act, ***431** Va.Code Ann. §§ 55-248.41 to 55-248.52 (Michie 1995).

West Virginia-w.Va. Code §§ 37-15-1 to 37-15-8 (Michie 1997).

Wisconsin-wis. Stat. Ann. § 710.15 (West Supp.1999).

Wash.,2000.
Manufactured Housing Communities of Washington v. State
142 Wash.2d 347, 13 P.3d 183

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136 Wash.2d 811, 966 P.2d 1252
(Cite as: 136 Wash.2d 811, 966 P.2d 1252)

▷
State ex rel. Washington State Convention and Trade Center v. Evans
Wash.,1998.

Supreme Court of Washington,En Banc.
The STATE of Washington, ex rel. the WASHINGTON STATE CONVENTION AND TRADE CENTER, Respondent,
v.
Julia M. EVANS, Robert J. Evans, Millie Evans, John P. Lycette, JR., Trustee under the Will of Robley H. Evans, deceased, Julia M. Albee, John Doe Albee, Dina Corporation, Diller Associates, Earl B. Diller Trust, Hertz Corporations, McLean Family Limited Partnership, Robert J. Allerdice, Charles R. Carey Trust, Estate of Charles R. Carey, Mary V. Sparks, John Doe Sparks, William J. Boyce, Jeanne P. Boyce, the Adele Keller Family LTD. Partner Ship, Yen Lui Studios, Inc., Appellants.
No. 65607-0.

Argued May 12, 1998.
Decided Nov. 12, 1998.

Property owners brought action challenging state's proposed condemnation of property for the purpose of expanding state convention center. The Superior Court, King County, Sharon Armstrong, J., entered judgment in favor of state. Property owners appealed. The Supreme Court, Durham, C.J., held that state could use power of eminent domain to make proposed acquisition, despite anticipated partial private use of property, because state sought to condemn no more property than would be necessary to accomplish the purely public component of project.

Affirmed.

Sanders, J., filed a dissenting opinion.

West Headnotes

[1] Eminent Domain 148 ⚿1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k1 k. Nature and Source of Power. Most Cited Cases
Power of eminent domain is an inherent power of the state.

[2] Eminent Domain 148 ⚿13

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases

Eminent Domain 148 ⚿56

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation. Most Cited Cases
For proposed condemnation to be lawful, state must prove that (1) the use is public; (2) the public interest requires it; and (3) the property appropriated is necessary for that purpose. West's RCWA Const. Art. 1, § 16; West's RCWA 8.04.070
.

[3] Eminent Domain 148 ⚿18

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k18 k. Public Buildings or Grounds, or Other Purposes of Government. Most Cited Cases

Eminent Domain 148 ⚿56

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation. Most Cited Cases
State could use power of eminent domain to

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Images:	0

condemn property for expansion of state convention center, though private developer would partially fund project and would acquire fee simple title to ground-level property on which expansion would sit; expansion project was a public use to which the anticipated private use of ground-level property was incidental, the two uses were independent of each other, and state sought to condemn no more property than would be necessary to accomplish the purely public component of project. West's RCWA Const. Art. 1, § 16; West's RCWA 8.04.070.

[4] Eminent Domain 148 ⚿14

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k14 k. Extent of Use or Benefit. Most Cited Cases
As long as property was condemned for public use, it may also be put to a private use that is merely incidental to that public use. West's RCWA Const. Art. 1, § 16; West's RCWA 8.04.070.

[5] Eminent Domain 148 ⚿13

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases
Private funding of a public project alone is not sufficient to defeat state's exercise of the power of eminent domain. West's RCWA Const. Art. 1, § 16 ; West's RCWA 8.04.070.

[6] Eminent Domain 148 ⚿68

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k68 k. Conclusiveness and Effect of Exercise of Delegated Power. Most Cited Cases
Unlike a determination of whether property to be condemned will be put to public use, questions concerning whether an acquisition is necessary to carry out a proposed public use are legislative; thus, a determination of necessity by a legislative body is conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud. West's RCWA Const. Art. 1, § 16; West's RCWA 8.04.070.

[7] Eminent Domain 148 ⚿56

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation. Most Cited Cases
Fraud or constructive fraud would occur, so as to invalidate legislative determination of necessity for condemning private property, if proposed public use were merely a pretext to effectuate a private use on the condemned lands. West's RCWA Const. Art. 1, § 16; West's RCWA 8.04.070.

[8] Eminent Domain 148 ⚿56

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation. Most Cited Cases
Relevant considerations in determining public necessity of condemning property that will be partially put to private use are the dollar contribution of the private party, the percentage of public versus private use, and whether the private use is occurring in an architectural surplus of usable space. West's RCWA Const. Art. 1, § 16; West's RCWA 8.04.070.

[9] Eminent Domain 148 ⚿56

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation. Most Cited Cases
State's decision to expand state convention center northward rather than eastward, requiring condemnation of private property on north side of center, was not arbitrary and capricious, in view of evidence that eastward expansion would have required dislocation of many more low-income residential units, relocation of mechanical and utility functions on east site would have required a

shutdown of center for many months, and further future expansion would not be possible on eastern site. West's RCWA Const. Art. 1, § 16; West's RCWA 8.04.070.

****1253 *813** John P. Lycette Jr., William J. Boyce, Thomas J. Greenan, Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Janet G. Lim, Snook & Bolton, Robert B. Spitzer, Garvey, Schubert & Barer, Seattle, Linda M. Youngs, Hanson, Baker, Ludlow & Drumheller, Bellevue, for Appellants.

Christine Gregoire, Atty. Gen., Robert A. Wright, Asst. Atty. Gen., Olympia, John R. Ellis, Asst. Atty. Gen., Seattle, for Respondent.

DURHAM, C.J.

Property owners challenge a King County Superior Court order adjudicating public use and necessity that authorizes the State to condemn their property for expansion of the Washington State Convention and Trade Center (Convention Center or Center). At issue is whether the State may exercise the power of eminent domain under article I, section 16 (amendment 9), given the anticipated partial private use of the condemned property. We hold that the State may use the power of eminent domain to acquire the property for the Convention Center expansion project because the State seeks to condemn no more property***814** than would be necessary to accomplish the purely public component of the project.

FACTS

The Convention Center plans to construct 110,000 square feet of new heavy load exhibit space. The Legislature approved the use of eminent domain to acquire property for the ****1254** expansion and approved a grant of $111.7 million dollars of State funding. The Legislature conditioned this grant on the Center's ability to raise $15 million in outside governmental or private funding. RCW 67.40.180. The Washington State Convention and Trade Center Board (WSCTC Board) formed a task force to examine expansion possibilities, which narrowed the options down to either an addition to the east of the current facility or an addition to the north.

The east expansion alternative would extend onto the First Hill neighborhood, across Hubbell Place and the Union Street right-of-way to Terry Avenue. Four residential apartment buildings would be demolished, causing a total loss of 394 mixed-income housing units. Convention Center operations would be shut down for between six months to a year while current physical plant structures were being relocated.

The north expansion site would extend the existing Convention Center across Pike Street and Eighth Avenue. A 127-unit apartment tower, a condominium/garage structure, six parking lots, and a rental car outlet would be displaced. The current exhibit space sits roughly four stories above ground at Eighth Avenue. In order to be contiguous to the current exhibit space, a north expansion would likewise sit four stories above street level. The north alternative would thus create surplus ground level space that the Center could lease or sell to reach the $15 million in outside contribution required by the Legislature.

The task force evaluated both options and considered the financial requirements, community impact, and effect on ***815** urban fabric of each alternative. The task force preferred the north alternative, basing its decision, in part, on social and architectural concerns. However, one compelling factor in the decision to choose the north alternative was the State's ability to meet the legislative outside contribution requirement by leasing or selling the surplus space created underneath the north expansion. The WSCTC Board adopted these findings and designated the north site as the preferred alternative.

The Convention Center then solicited proposals for private development in the space below the proposed north expansion. R.C. Hedreen Company (Hedreen) submitted a development plan that was eventually chosen by the Center as the most suitable to its needs. The Board entered into an Option, Purchase and Development Agreement with Hedreen. Under this agreement, Hedreen will contribute the $15 million required for legislative approval of the project. Hedreen also will build the outer shell of the Convention Center. This shell

will be supported by huge foundation columns, extending from the exhibit hall to the ground, which will be stabilized by interstitial floors. Also, numerous stairways, utility runs, and other support facilities will intrude down into the space underneath the exhibit hall. In return, Hedreen will take fee simple title to the remaining space below the Convention Center for construction of retail and parking, and will construct a hotel tower in the northwest corner of the parcel (on land already owned by the convention center and not subject to these eminent domain proceedings).

The Convention Center instituted condemnation proceedings pursuant to RCW 67.40.020 and RCW 8.04 to acquire fee simple title to nine tracts of land in the north expansion area. One property owner granted immediate use and possession. The remaining property owners challenged the condemnation. They argued that the State was impermissibly seeking to condemn their property for private use. The property owners also argued that the decision to choose the north site based on the possibility of private funding was arbitrary and capricious.

***816** The Superior Court, in its amended and final findings of fact and conclusions of law, ruled in favor of the Center and entered an order adjudicating public use and necessity. The Court found that (1) the expansion of the Convention Center is a public purpose; (2) the exhibit space would cover the entire area of the nine parcels sought to be condemned; (3) the Center will be making a public use of the exhibition space, the support columns, and stairwells, and the lateral flooring; and (4) the area beneath the hall and between the columns will be created as an inevitable consequence of constructing the public space, and must be leased to another entity or ****1255** remain empty. The court also found that in order to be successful as an exhibit hall, the exhibit area must be open and cannot be penetrated by support columns. Thus, no structure can be built above the exhibit hall space. This structural requirement precludes access to the air rights above the exhibit hall and, therefore, such air rights would be taken for purely public purposes.

Based on these findings, the court concluded that the volumetric ratio of private use to public use is approximately 20 percent to 80 percent. The court thus held that the private use would accompany the public use in a subordinate way, and that sale of the space to private users to prevent waste is an incidental use. The court also held that the expansion to the north site rather than the east site was necessary. The north option dislocated fewer housing units and the Convention Center could continue operating during construction. Were the east site chosen, it would require the relocation of mechanical and utility functions resulting in a shutdown of the convention center for six months to a year.

The property owners appealed the trial court's order and the case was transferred to this court for direct review.

ANALYSIS

[1][2][3] The power of eminent domain is an inherent power of the state. *Miller v. City of Tacoma*, 61 Wash.2d 374, 382, 378 P.2d 464 (1963) . This power is limited by both the ***817** Washington State Constitution and by statute. Article I, section 16 (amendment 9) prohibits the State from taking private property for private use. RCW 8.04.070 requires that a proposed condemnation be necessary for the public use. This court has developed a three-part test to evaluate eminent domain cases. For a proposed condemnation to be lawful, the State must prove that (1) the use is public; (2) the public interest requires it; and (3) the property appropriated is necessary for that purpose. *In re City of Seattle,* 96 Wash.2d 616, 625, 638 P.2d 549 (1981) (citing *King County v. Theilman,* 59 Wash.2d 586, 593, 369 P.2d 503 (1962)). Property owners challenge the present condemnation on the first and third grounds. They argue that the expansion project is not "for public use" because Hedreen's participation creates an impermissible mix of public and private uses. They also argue that the adoption of the north alternative was not necessary given the availability of an east alternative that did not involve private participation.

Public Use

[4] The constitution prohibits the taking of private property for a private use. However, this language does not create a blanket prohibition on the private use of land condemned by the State. As long as the property was condemned *for the public use*, it may also be put to a private use that is merely incidental to that public use. *Chandler v. City of Seattle*, 80 Wash. 154, 159, 141 P. 331 (1914); *City of Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 428, 107 P. 199 (1910). The property owners concede that the exhibit hall space will be put to a public use. The question then is whether Hedreen's participation in the expansion project corrupts the public nature of the project, or whether it is merely incidental.

The property owners argue that Hedreen's involvement in the project is not incidental. They rely on *In re City of Seattle,* 96 Wash.2d 616, 638 P.2d 549 (1981) (*Westlake*) for the proposition that a private use is not incidental if the public and private uses are combined "in such a way that ***818** the two cannot be separated." *Westlake*, 96 Wash.2d at 627, 638 P.2d 549. The property owners argue that the expansion project depends upon Hedreen's participation to meet legal and architectural requirements in such a way that the public and private spaces cannot be separated. Property owners err in their interpretation of *Westlake* and its application to the facts of this case.

Westlake involved the proposed acquisition of the properties that now constitute the Westlake Mall in Seattle. The City of Seattle intended to create a downtown urban focal point in order to forestall the decay experienced by other cities' retail cores. To this end, the City attempted to condemn several parcels of land. The City planned to construct a park on part of the land acquired, ****1256** and deed the rest of the land to a private developer, who would build a mall, a monorail terminal, and museum space.

Several property owners challenged the condemnation. On discretionary review, this court analyzed the mixed uses in the plan and observed that the retail shops were a substantial element of the project, essential to its functioning. The court stated that "[i]f a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked." *Westlake*, 96 Wash.2d at 627, 638 P.2d 549 (citing *State ex rel. Puget Sound Power & Light Co. v. Superior Court*, 133 Wash. 308, 233 P. 651 (1925)).

The court held that the use of the power of eminent domain to acquire the land was unconstitutional because the project did not constitute a public use. The court explained:

The City strenuously argues that since it has the statutory authority to condemn land for public squares, parks or museum purposes ..., this project is a public use. Were the retailing functions only incidental to those uses, a different question would be presented. However, the evidence shows, as the trial court found, that the primary purpose of the undertaking was to promote the retail goal.

Westlake, 96 Wash.2d at 629, 638 P.2d 549.

***819** The property owners argue that the facts in *Westlake* are substantially similar to those presented by the Convention Center expansion. The expansion and the retail development are financially interdependent. The statute authorizing the expansion provides that the project may not proceed without outside funding. Property owners reason, therefore, that the investment of $15 million by Hedreen is the "*sine qua non*" to the WSCTC's ability to proceed with the project. Thus, the public and private uses are combined in such a way that they cannot be separated. We disagree.

[5] First, contrary to the property owners' assertions, private funding of a public project does not necessarily corrupt the public nature of that project. Appellants fail to cite any cases to support their argument that private contribution to a project's expenses defeats the exercise of eminent domain. On the contrary, in *Town of Steilacoom v. Thompson*, 69 Wash.2d 705, 419 P.2d 989 (1966), this court affirmed a finding of public use and necessity where a private developer advanced funds for condemnation awards and financed a public sewer extending to his development. Private

funding of a public project alone is not sufficient to defeat the State's exercise of the power of eminent domain.[FN1]

> FN1. The property owners also suggest that the expansion is dependent upon the Hedreen development to satisfy a zoning ordinance that requires pedestrian oriented frontage at ground level. At this juncture, the significance of the zoning ordinance is unclear. The trial court found that the Hedreen development did fulfill the zoning requirement. However, in the absence of the development, there is no indication from the record whether the City of Seattle would halt the project rather than grant a variance. The city is a participant in the expansion. It has promised the Center $7.5 million for construction and has granted WSCTC a 30-year lease to manage and operate its Freeway Park parking garage.

Second, unlike *Westlake,* the retail development in this case is not a primary purpose of the project. In *Westlake*, the City sought to condemn property to create a downtown retail focal point. One primary purpose of the project was to revitalize the downtown retail core, and its success hinged on the construction of the private retail space. The court observed that not only was the mall a substantial element of the project, it was "essential to its functioning." *Westlake*, 96 Wash.2d at 628, 638 P.2d 549. Condemnation was improper in ***820** *Westlake* because the project for which the land was to be condemned was predominantly private in nature.

In this case, the trial court found that the purpose of the Convention Center expansion is to expand the exhibit space, and that the new exhibit space will constitute a public use. The retail development of the floors beneath the expansion in no way affects its functioning as an exhibit space. The independence of the two projects is evidenced by the fact that if this court were to find for the property owners, the State could condemn the same land for the north expansion absent Hedreen's ****1257** participation.[FN2] Without the private development, the State could build the same exhibit hall, on the same property, hovering at the fourth story level on the same support columns. The project could go forward without private participation in entirely the same manner, except that three stories of vacant space would lie unused underneath the structure. Thus, the private development in this vacant space is a separable component of the expansion project. Hedreen's participation is a means to an end, but it is not an end in and of itself.

> FN2. Pursuant to Laws of 1995, ch. 386 (codified at RCW 67.40.180), WSCTC would have to obtain outside funding from the County or private donations in order to proceed without Hedreen's participation.

Finally, the property owners place mistaken emphasis on Westlake's statement that public and private uses may not be "combined ... in such a way that the two cannot be separated." *Westlake*, 96 Wash.2d at 627, 638 P.2d 549. *Westlake* gleaned this test from a series of power plant cases decided in the early 1900s. These cases ruled on the use of eminent domain where land was to be condemned for the purpose of creating a single facility with both public and private uses. *See, e.g., State ex rel. Puget Sound Power & Light Co. v. Superior Court,* 133 Wash. 308, 233 P. 651 (1925); *Chandler v. City of Seattle,* 80 Wash. 154, 141 P. 331 (1914); *City of Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 P. 199 (1910); *State ex rel. Harris v. Superior Court,* 42 Wash. 660, 85 P. 666 (1906). The framework created by these cases is ***821** not helpful here because the expansion project does not contemplate alternate public and private use of the same facility. Rather, the expansion project will consist of two entirely separate facilities, one wholly public, the other wholly private.

In *Puget Power*, the State sought to condemn land for a power plant that was to supply electricity to public and private consumers.[FN3] In order to determine the ultimate nature of the use for which the land was to be condemned, the court compared the amount of each use, and examined whether the

two uses were both integral to the decision to condemn the land. In effect, the court examined whether the public use alone was sufficient to justify the condemnation. The court looked " 'to the substance rather than the form, to the ends rather than to the means' " and held that

> FN3. Prior to 1927, production of power in order to supply private industry was considered to be a private use. This court ruled that power production was per se a public use in *State ex rel. Chelan Elec. Co. v. Superior Court,* 142 Wash. 270, 253 P. 115, 58 A.L.R. 779 (1927).

[t]here is neither allegation nor finding in this case that there is at this time, or according to any anticipated need for the near future, any necessity for the taking of this property for public use. On the contrary, it appears clearly that if there is any necessity whatever for acquiring the property it is for the prosecution of uses that are both public and private and which are combined in such manner that they may not be separated.
Puget Sound Power, 133 Wash. at 312, 314-15, 233 P. 651.

The power plant cases all dealt with commingled public and private uses. Where a joint public/private facility served dual purposes, the court was faced with the task of determining whether the condemnation served a public or private use. Thus, the court attempted to discern whether the project was of a predominantly public or private nature. These cases emphasized that some private use of condemned land is permissible as long as the private use is not itself the impetus for the condemnation.
"[I]f a private use is combined with a public one in such way ***822** that the two could not be separated, that the right of eminent domain may not be invoked to aid the joint enterprise. We mean by this, that the two purposes must together exist as main, or principal, ones; but where the private purpose is simply an incident, and the public use the principal, then the incident will not destroy or defeat the principal."
Nisqually Power Co., 57 Wash. at 428, 107 P. 199 (quoting *Lake Koen Navigation, Reservoir & Irrigation Co. v. Klein,* 63 Kan. 484, 497, 65 P. 684 (1901)).

****1258** The power cases were distinctive in that the condemnation was for a single facility that had alternating public and private uses. These cases are thus factually dissimilar to the present case. The Convention Center expansion is not a commingled public/private use. Instead, it is two distinct facilities: an exhibit hall and ground level retail. The expansion project contemplates a wholly public facility stacked above a wholly private development. Thus, although the Hedreen development is an integral part of the expansion plan, under the framework created by *Westlake* and the power cases, the two uses are not combined in such a way that they cannot be separated.

However, this initial determination that the two uses are not so combined cannot alone validate the State's use of eminent domain. We must still examine whether the Hedreen development is incidental to the expansion project. Article I, section 16 prohibits the taking of private property for private use. Thus, this court must ensure that the entire parcel subject to the eminent domain proceedings will be employed by the public use. The relevant inquiry is whether the government seeks to condemn any more property than would be necessary to accomplish purely the public component of the project. If the anticipated public use alone would require taking no less property than the government seeks to condemn, then the condemnation is for the purpose of a public use and any private use is incidental.

Applying this rule to the present case, we hold that the expansion project is ***823** a public use, and that the Hedreen development is merely incidental. The new exhibit space is a public use, and its footprint spans the entire property to be condemned. Because the expansion alone would require taking no less property than the government seeks to condemn, the Hedreen development in the space beneath the exhibit hall is merely incidental.

Necessity

In order for the State to invoke the power of eminent domain, the land must not only be taken for a public use, but also the property appropriated must be *necessary* for the public use. *City of Tacoma v. Welcker*, 65 Wash.2d 677, 399 P.2d 330 (1965). Appellants argue that, given the availability of the east alternative where private development is not feasible, the decision to expand on the north site based on the availability of co-development was arbitrary and capricious.

[6] The nature of the determination of public necessity, and thus the standard of judicial review of a declaration of public necessity, differs from that applied to a declaration of public use. Unlike a determination of public use, questions concerning whether an acquisition is necessary to carry out a proposed public use are legislative. Thus, a determination of necessity by a legislative body is conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud. *Welcker*, 65 Wash.2d at 684, 399 P.2d 330.

[7][8] The property owners have not presented facts that would amount to fraudulent behavior by WSCTC. Fraud or constructive fraud would occur if the public use was merely a pretext to effectuate a private use on the condemned lands. This court has not previously enumerated factors to consider when determining whether a public use is truly necessary, but some relevant considerations are the dollar contribution of the private party, the percentage of public versus private use, and whether the private use is occurring in an architectural surplus of usable space.

There is no indication in this case that the State is using the exhibit hall expansion as a pretext in order to condemn ***824** the land for private use. Hedreen is contributing only $15 million to a project requiring well over a $100 million investment. Hedreen will be occupying a majority of the developed space. However, the trial court correctly observed that, given the structural requirements of the exhibit hall, the buildable airspace above the Center must be left vacant and is thus taken for the public use. Including the airspace, 80 percent of the usable area will be occupied by a public use. Finally, the area to be occupied by Hedreen will be created due to structural requirements of the exhibit hall. Because the heavy load exhibit space must be contiguous ****1259** to the existing exhibit hall, it must be built on the fourth story level. Several floors of surplus space thus will be created out of architectural necessity. This area not needed by the Convention Center would lie vacant without private participation.

[9] The property owners contend that the decision to expand north was arbitrary and capricious because it was based on the private development options presented by the north expansion. Although this was one basis for the WSCTC Board's choice of the north site, it was not the sole justification. Indeed, the trial court found that several other factors, in addition to the private development potential, motivated the election of the north site over the east site: (1) the building on the east site would have required dislocation of many more low income residential units; (2) the relocation of mechanical and utility functions on the east site would have required a shutdown of the Convention Center for many months; and (3) further future expansion would not be possible on the eastern site. Appellants do not challenge these findings.

Given the existence of these other factors justifying expansion to the north, the trial court correctly concluded that the Convention Center's decision to expand north was not arbitrary and capricious.

CONCLUSION

The Hedreen development is not combined with the ***825** expansion project in such a way that the two cannot be separated, nor is the State seeking to condemn any more land than that necessary for the expansion alone. Thus, the private use by Hedreen of the condemned land is incidental to the expansion project. Furthermore, in the absence of proof of arbitrary and capricious behavior amounting to constructive fraud, we will not disturb

the legislative determination that the north expansion is necessary for the public use. The property owners do not allege that the exhibit hall expansion was used as a pretext to effectuate Hedreen's development. Nor have they shown that the choice of the north alternative based in part on housing dislocation, mechanical requirements and future expansion possibilities was arbitrary and capricious. Therefore, we hold that the State may lawfully exercise the power of eminent domain to acquire the parcels for the Convention Center expansion.

DOLLIVER, SMITH, GUY, JOHNSON, ALEXANDER and TALMADGE, JJ., concur.

SANDERS, J. (dissenting).

The Washington Constitution's prohibition against taking private property for private use is absolute: " Private property shall not be taken for private use.... " Const. art. I, § 16 (amend.9). Where the condemned property is to be devoted to *both* a private and a public use, the constitutional prohibition has no less force:

> If a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked.
> ... [W]here the purpose of a proposed acquisition is to acquire property and devote only a portion of it to truly public uses, the remainder to be rented or sold for private use, the project does not constitute public use.

In re City of Seattle, 96 Wash.2d 616, 627-28, 638 P.2d 549 (1981) (citations omitted).

***826** Therefore, whether one construes these facts to indicate public and private use which cannot be separated, or uses which are wholly separate, the result must be the same: *any* taking for private use is constitutionally forbidden.

Yet this court's majority rests its conclusion that this seizure of private property for private use passes constitutional muster upon a claimed judicially created exception for "incidental private use." Therefore it is the nature and scope of this claimed exception which we must primarily examine.

To summarize, I would hold: (1) the incidental private use exception is inapplicable because " incidental use" is a private use to effect, aid, or accomplish the same object as the principal use, not simply a wholly distinct private use which may be quantitatively smaller and, most importantly, *the exception does not permit any additional condemnation**1260 of private property to serve the private use*; (2) any taking in excess of the air space and vertical support necessary for the overhead exhibit hall facility is unconstitutionally in excess to that which is necessarily condemned to permit the public use; and (3) the contemplated recoupment sale whereby condemned private property is sold by the government to a new private owner for profit illustrates, and proves, that this condemnation is not only for private use, but is unconstitutionally in excess of that which is necessary.

Before proceeding to the legal analysis, however, I pause to notice some facts which are particularly germane to the issues presented.

Facts Pertaining to Private Use, Excess Condemnation on Recoupment Sale

After an extended hearing, the Honorable Sharon S. Armstrong, Chief Civil Judge of the King County Superior Court, entered 41 paragraphs of detailed findings to which none of the parties takes serious exception.

At the outset, the learned trial judge recognized the statutory imperative that an expansion to the convention ***827** center exhibit hall would not be approved absent a $15 million contribution in public or private funds. *See* Clerk's Papers (CP) at 41 (Findings of Fact ¶ 15, of Superior Court " Findings of Fact and Conclusions of Law as to Public Use and Necessity," dated June 9, 1997) (" Findings"). Although initial hopes had been entertained that the King County government would front the difference, it soon became apparent that the only possible source of these funds was from private sources and that such funds would not be forthcoming unless property in excess of that which was truly necessary for the convention hall expansion was condemned so as to allow for a

private development potential. Thus, the proposed eastward expansion of the convention hall was discarded because it would provide no "surplus" property to induce the $15 million private contribution.

Northward expansion, however, remained a prime candidate since only the air space, about 30 feet from floor to ceiling, would be necessary between four to six stories above the existing surface at a level between elevation 205 and 242 feet. CP at 43 (Findings ¶ 21). Thus the excess space below elevation 205, the "ground parcel," could be used by a private developer, consistent with foundation columns, for retail, hotel, and parking facilities, in conjunction with a privately owned hotel tower rising above a portion of the exhibit hall roof (purchased, not condemned) in the extreme northwest corner of the project. CP at 43 (Findings ¶ 22).

The north alternative was therefore specifically chosen because it provided this opportunity for private use, at government profit, whereas the east alternative was specifically rejected because it " provided no private co-development opportunities that would produce a net financial contribution to the project." CP at 44 (Findings ¶ 26).

The brief of the convention center emphasizes at some length the uniquely separate and private nature of the project below elevation 205, quoting James Ellis, Chairman of the WSCTC Board of Directors, that

***828** [T]he projects themselves are separate. They will be separately owned, separately managed, separately operated and not enter [*sic*] connected in an operational sense. But they are joined for purposes of construction for economies yielded to both parties.

Report of Proceedings (RP) (May 13, 1997) at 83.
The trial court specifically identified this separate private use:When the structures are complete, the *privately developed space will be separately owned* and operated from the Convention Center space, and the hotel space will not be interconnected to the Convention Center Space. The Convention Center and private spaces will be physically separate.

CP at 48 (Findings ¶ 38) (emphasis added).

Of particular importance is Finding 37 wherein it is acknowledged that the condemned fee was not only divisible from the public use servitude but specifically would be resold to a private developer:
There will, however, be floors of hotel support facilities and other hotel use in the northwest block and after construction is ****1261** completed, the *private developer, Hedreen, will receive fee simple title to all surplus property in the northwest block, subject to the Convention Center's ownership of its Exhibit Hall space and easement or fee interest in the supporting columns, stairwells and utility chases* , and subject to the terms and restrictions of the Development Agreement preventing the penetration of the Exhibit Hall.

CP at 47-48 (Findings ¶ 37) (emphasis added).

I therefore posit the determinative facts for our review may be summarized as follows:

(1) The condemned property was specifically selected because of the government's intention to resell a portion of the seized space to a private entrepreneur for private use;

(2) The space dedicated to private use will, as part of the same transaction, be deeded in fee to the new private user subject to an easement reserved to the convention center for the overhead exhibition hall and support; and

(3) The private use, except for the financial considerationpaid ***829** by its private owner, does not in any way, shape, or form contribute, relate to, or enhance the public exhibition hall use.

I.

Private Use

Whether the test is stated as public-use or public-purpose, there is one thing about which American courts have always said that they were adamant. Eminent domain cannot be used to

transfer property from one private person to another. [FN1]

FN1. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L.Rev. 553, 595 (1972) (citing *VanHorne's Lessee v. Dorrance,* 2 U.S. 304, 2 Dall. 304, 1 L.Ed. 391 (1795) and *Coster v. Tide Water Co.,* 18 N.J.Eq. 54 (1866)). "Take that simple case: government pays for and condemns *A*'s land and immediately gives it to *B*. No one will seriously contend that the transfer was not from *A* to *B*, just because the land paused momentarily in the government." Stoebuck, *Theory of Eminent Domain, supra*, at 598.

A. *Absolute Prohibition of State Constitution*

The eminent domain provision of the Washington Constitution, Const. art. I, § 16 (amend.9), presents one of the strongest mandates against public taking for private use of any in the nation.[FN2] Our text expressly prohibits taking property for private use whereas the Fifth Amendment to the United States Constitution only disallows same by inference (" [N]or shall private property be taken for public use... ."***830**). History demonstrates these words of article I, section 16, were carefully chosen to strengthen our guarantee over rejected language from other state constitutions (similar to that of the Fifth Amendment), affording our residents enhanced constitutional guarantees against injustice and oppression.[FN3]

FN2. **§ 16 EMINENT DOMAIN.** Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided*, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.
Const. art. I, § 16 (amend.9).

FN3. W. Lair Hill published a proposed constitution for Washington in *The Oregonian* on July 4, 1889, which served as the working draft for the delegates to the 1889 Constitutional Convention. Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L.Rev. 669, 674 n.38 (1992). The notes of the Constitutional Convention contain a tribute to Hill and reflect the tremendous impact of his draft upon the convention delegates. *See* Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 Wash. Hist. Q. 227, at 253 (1913). The language of the draft, very similar to that ultimately proposed and ratified, was explained in Hill's commentary:
Most of the constitutions, if not all now in force, prohibit the taking of private property for public use without compensation; but experience has demonstrated that such a general provision is entirely inadequate to prevent great injustice, and often the most serious oppression.

> W. Lair Hill, *Washington, A Constitution Adapted to the Coming State* 8 (1889).

**1262 This absolute and mandatory language is only strengthened, not diminished, by the enumeration of certain, but here inapplicable, exceptions "for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes." The text demonstrates the ratifying public recognized and incorporated these specific exceptions to the otherwise absolute constitutional prohibition as if to say there are no others. Expressio unius est exclusio alterius.[FN4]

> FN4. "[T]he expression of one thing is the exclusion of another." *Black's Law Dictionary* 581 (6th ed.1990).

The context of this constitutional provision includes article I, section 29, which states, "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise," as well as section 32, which counsels, "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity *831 of free government." [FN5] Such principles must be divined to guide our review if we are to keep the faith of our Fathers.

> FN5. If the aforementioned were not enough, article I, section 1, administers the coup de grace as that provision provides that "governments ... are established to protect and maintain individual rights"; whereas the power of eminent domain, classically considered government's " despotic power," (Roger Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y.L. Sch. L.Rev. 311, 320 (1994); Stoebuck, *Theory of Eminent Domain, supra,* at 585-86) was expressly and overtly limited by the text of article I, section 16.

Moreover within the text of the operative section itself our Framers and Ratifiers expressly rendered the question of public or private use a wholly judicial one ("Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public...." Const. art. I, § 16) (amend.9) to be independently determined without deference to legislative direction or preference. *See Healy Lumber Co. v. Morris,* 33 Wash. 490, 500, 74 P. 681 (1903) (unlike all but two others, our constitution mandates the court be "untrammeled by any consideration due to legislative assertion or enactment."). *See also* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L.Rev. 553, 586 (1972) (this clause is responsible for Washington requirement that there be a separate hearing on public use and necessity).

As held in *Hogue v. Port of Seattle,* 54 Wash.2d 799, 838-39, 341 P.2d 171 (1959), our constitutional prohibition against taking private property for private use is equal in significance to the great constitutional guarantee that just compensation must be paid as a condition precedent to the exercise of the government's power of eminent domain:

> [I]t is the duty of the courts to uphold the rights of private property owners against the inroads of public bodies who seek to acquire it for private purposes which they honestly believe to be essential for the public good.
> The people of this state have placed in our constitution*832 (Art. I, § 16 (amendment 9)) two restrictions on the power of the state and its municipal subdivisions to acquire private property. Without these two restrictions, the sovereign power to take private property would literally be without limitation. One limitation is that just compensation therefor (as fixed by a jury) must first be paid to the owner, and the second limitation is that a court must determine whether the use for which the property is sought is really a public use. These two restrictions were placed in the constitution for the protection of private property, and each one is equally as important to the property owner as the other. In other words, it is just as important that **1263 the proposed use of the property be limited to what the court decides to be a "really public" use as it is that

the property owner be given just compensation.

Id. at 838, 341 P.2d 171. Certainly it is not our role today to diminish, even by a farthing, that liberty which our Forefathers have bequeathed.

B. *Incidental Use Doctrine*

While the trial court recognized the contemplated private use is obvious and incontrovertible, it nevertheless concluded this condemnation for combined private and public use is constitutionally permissible because "the volumetric ratio of private use to public use is approximately 20 percent to 80 percent." Majority at 1255. Although this calculation is somewhat problematic since the 80 percent product can be achieved only by counting empty air space over a structure which is two-thirds private and one-third public, the principle enunciated by the trial court, that private property may be condemned for private use so long as not more than 50 percent of the total seizure by area or volume is for private use, finds no principled origin in our constitutional text. Rather in consequence the trial court fashioned a rule permitting private property to be constitutionally seized for private use even when the total seizure exceeds that which is publicly necessary by up to 99 percent. That this is the trial court's rule there can be no doubt since the trial court was quite emphatic in her view that without inclusion of the air space in the "public use" ***833** calculation, condemnation would constitutionally fail as a public taking for private use.[FN6]

> FN6. I wish to be clear about one condition for my finding of public use. It is that the air space over all these parcels the petitioner seeks to condemn will not be privately used. If any of the air space is privately used, the private use would completely change the calculus of the use and it would make the private use dominate rather than incidental. This means that the purpose would still be a public one, but the use would be predominately private. If the petitioner condemns the Sansei property, for example, it cannot co-develop the air space with a private party or dedicate it to a private use.
> CP at 30 (King County Superior Court Oral Dec. (5/16/97)).

Notwithstanding, the majority of this court opts for an even more extreme proposition: if any layer of air space is necessary for public use, condemnation of everything from Hades below to the heavens above is fair game for condemnation without concern for the intended private use of nearly everything in-between. Majority at 1258 ("... its footprint spans the entire property to be condemned"). Therefore, from the majority's perspective, the government may condemn a 50-story office building intending only to use one floor for a legitimate public use, selling all of the remaining confiscated private property to the highest private bidder.

While I think it is correct that previous case law indeed stands for the proposition that condemned property "may also be put to a private use that is merely *incidental* to that public use," Majority at 1255 (emphasis added), before applying this maxim we must necessarily consider the meaning of the term "incidental" as used in those cases, and then test the result against that which the constitutional text forbids. Of course it is ultimately the constitution which we are to protect and expound. Therefore if a branch of judicial precedent should subvert it, which I do not believe this does if properly understood, we had better tear out the tree of precedent by its roots than allow it to infect the remaining orchard with its virulence.

The majority cites *Chandler v. City of Seattle,* 80 Wash. 154, 141 P. 331 (1914) and ***834***City of Tacoma v. Nisqually Power Co.,* 57 Wash. 420, 107 P. 199 (1910), to support its claim of incidental private use. However the rule I would distill from these cases, and every other incidental private use case,[FN7] is ****1264** that to be "incidental" the private use must usually be in like kind to the public use, or at least dependent upon the public use, and that in *no case may more property be condemned to support the public and private use than would*

necessarily be condemned to permit the public use even if the private use were entirely eliminated.

FN7. *State ex rel. Harlan v. Centralia-Chehalis Elec. Ry. & Power Co.,* 42 Wash. 632, 634, 85 P. 344 (1906) (electric railway incorporated for both public and private uses may condemn land for purely public ones; however, "where the two are not so combined as to be inseparable, the good may be separated from the bad, and the right [of eminent domain may be] exercised for the uses that are public."); *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 665-66, 85 P. 666 (1906) (may not condemn land for purpose of generating electricity for both public and private use); *State ex rel. Dominick v. Superior Court,* 52 Wash. 196, 202, 100 P. 317 (1909) (sale of portion of electric power to third party not sufficient reason to deny power of eminent domain, where power sold will be devoted to public use); *State ex rel. Lyle Light, Power & Water Co. v. Superior Court,* 70 Wash. 486, 491, 127 P. 104 (1912) (Condemnation statute authorizing sale of excess power is valid only when such power has been generated in good faith for public use but not needed therefore and would otherwise go to waste.); *State ex rel. Weyerhaeuser Timber Co. v. Superior Court,* 71 Wash. 84, 90, 127 P. 591 (1912) (Land may be condemned for power generation when no power will be used for nonpublic purpose except in such small, insignificant, and incidental amount as to not defeat public character of the use.); *State ex rel. York v. Board of Comm'rs,* 28 Wash.2d 891, 904, 184 P.2d 577, 172 A.L.R. 1001 (1947) (poles and wires for carrying electricity lining a highway are an excepted incidental use of the highway and abutting property owners have no right to additional compensation); *Winkenwerder v. City of Yakima,* 52 Wash.2d 617, 328 P.2d 873 (1958) (city ordinance authorizing leasing of advertising space on city parking meters does not offend constitution); *Northwest Supermarkets, Inc. v. Crabtree,* 54 Wash.2d 181, 186, 338 P.2d 733 (1959) (dedication of a street to public use includes easement sewer rights incidental to the use of the street).

Chandler concerned the validity of bonds for construction of a steam plant and was, therefore, not an eminent domain case at all. It seems the plant produced electricity in sufficient quantity to supply and satisfy not only the public demand but also yielded a surplus of power during certain hours of minimal public demand. The surplus was therefore available for private use as an "incidental" by-product of the publicly operated facility. This incidental power was an intrinsic and unavoidable consequence of steam plant operation, unlike the situation we have here ***835** where the very selection of property to be condemned was structured to provide for a separate and distinct private use, with recoupment sale on top of that.
Relying upon *Nisqually*, by analogy, the rationale advanced in *Chandler* explains the distinction between an "incidental" use which will support condemnation and a nonincidental use which will not:
If, in the meantime, it permits a small mechanic to run his lathe or sharpen his tools, such a use being so insignificant and so small as compared with the necessities that must be supplied, no court would hold that such use was such a private use as to prevent the city from maintaining these proceedings. A private use incidentally included will not defeat the right to condemn for public use so long as the public use is maintained.

Chandler, 80 Wash. at 159, 141 P. 331 (quoting *Nisqually,* 57 Wash. at 428, 107 P. 199). *Chandler* then articulated the "different rule" which applies to other situations:In that case, the incidental use was smaller than in the case at bar, but the difference is one of degree, not of principle. Where there is a commingling of two objects to the extent that both are principal objects, a different rule applies.

Chandler, 80 Wash. at 159, 141 P. 331. Here a " different rule" *does* apply because objectively (as well as subjectively) the private parking use is *a*

principal object, although arguably not the only object or even the predominate one. As set forth in *Chandler,* just because "the incidental use was smaller" is of no account as the true distinction is of principle, not degree. I would thus agree with the thrust of Justice Robert Utter's observation that " incidental" is not a "quantum reference" but rather that which is "incidental to the overarching public purpose." *In re City of Seattle,* 96 Wash.2d 616, 643-44, 638 P.2d 549 (1981) (Utter, J., dissenting).

Similarly, the private use at issue here is not " incidental" to the convention hall use in the sense that the private use is in any way ancillary to, the product of, or otherwise related to the public use of the exhibit hall facility above it. If we call it " incidental," we call it that only because of its ***836** physical proximity to the public use and its alleged relative quantum. But that is a difference in degree, not kind, and such a definition of "incidental " would authorize what our constitution prohibits: condemnation of private property for private use. Moreover, here the "incidental" private use is used to justify condemnation of more property than is truly ****1265** necessary for merely the exhibition hall use, a justification which even the majority claims to reject in theory, Majority at 1253 ("the State seeks to condemn no more property than would be necessary to accomplish the purely public component of the project"), but, as will be seen, embraces in practice.

II.

Excess Condemnation

"Excess condemnation is the acquisition by the government through eminent domain of more property than is directly necessary for a public improvement." 2A Julius L. Sackman, *Nichols on Eminent Domain* § 7.06[7][a] at 7-169 (3d rev. ed. 1998) ("Excess Condemnation").

A. *Public Use Doctrine*

Our constitution prohibits excess condemnation of more property than is necessary for the proposed public use even if no private use is contemplated. *City of Pullman v. Glover,* 73 Wash.2d 592, 439 P.2d 975 (1968); *Eastvold v. Superior Court,* 48 Wash.2d 417, 294 P.2d 418 (1956); 3 Julius L. Sackman, *Nichols on Eminent Domain* § 9.03, at 9-10 (3d rev. ed. 1998) ("Extent of Interest Acquired, [1]-Reasonable Necessity Rule"). This required nexus to necessity is known as the public use doctrine. Stoebuck, *Theory of Eminent Domain* , *supra,* at 589. Accordingly, the power of eminent domain is strictly construed against the government, 3 *Nichols* § 9.03, *supra,* at 9-17, 9-18, to protect against its abuse.

The majority also acknowledges the rule that "[f]or a proposed condemnation to be lawful, the State must prove that ... property appropriated is necessary for that [public]***837** purpose," Majority at 1255, as well it must. *Spokane Valley Land & Water Co. v. Arthur D. Jones & Co.,* 53 Wash. 37, 48, 101 P. 515 (1909) ("It is fundamental that the condemning party cannot take more than his reasonable necessities require."). *See also City of Tacoma v. Humble Oil & Ref. Co.,* 57 Wash.2d 257, 260, 356 P.2d 586 (1960) (stating "universal rule that the condemner may take no greater interest than is reasonably necessary for the contemplated public use or necessity.") (citations omitted).

B. *Necessity is Measured by Narrowest Estate to Permit Public Use*

It follows from the reasonable necessity rule (*i.e.*, that the condemnor may take only that estate reasonably necessary to accomplish the purpose for which the property is to be taken) that only an easement or a qualified fee is ordinarily taken, except if the authorizing statute provides that a fee simple shall be taken, or if a fee simple is necessary for the purposes for which the land is taken. Therefore, if the statute is silent regarding the estate to be taken, only an easement may be acquired or, if necessary, a base or qualified fee.[FN8]

FN8. The statute which serves as the basis for this convention hall condemnation does

not dictate that a fee estate be condemned. *See* RCW 67.40.020(2).

3 *Nichols* § 9.03[3][a], *supra,* at 9-20, 9-21.

"The estate or interest which is acquired by eminent domain when it is not necessary to condemn the fee is usually called an easement or servitude.... [S]uch an estate or interest exists, and has existed at least as long as private easements have existed." *Id.* at 9-23.

So too it is clearly the rule in this jurisdiction as well that the "necessity" of the taking must be defined by the narrowest estate in land which will accomplish the public use; whereas condemnation of an easement or other servitude, not a fee, is the norm.
"[I]t is well settled that when land is taken for the public use, unless the fee is necessary for the purposes for which the land is taken, as for example when land is taken for a schoolhouse ***838** or the statute expressly provides that the fee shall be taken, the public acquires only an easement."

City of Seattle v. Faussett, 123 Wash. 613, 618, 212 P. 1085 (1923) (quoting 10 R.C.L. 88). *See also City of Pullman v. Glover,* 73 Wash.2d 592, 595, 439 P.2d 975 (1968) ("In fact, the extent of the taking may be no greater than is reasonably necessary for the stated public purpose."); William B. Stoebuck, 17 *Washington Practice, Real Estate: **1266 Property Law* § 9.10, at 558 (1995); 3 Nichols § 9.03[3][a], supra, at 9-20.

Just as a railroad may not condemn a right of way in fee, but only as an easement to be extinguished upon abandonment, *Neitzel v. Spokane Int'l Ry. Co.,* 65 Wash. 100, 117 P. 864 (1911), the "necessary" estate to be condemned here is at the fourth-floor level, and arguably above, plus only that space " necessary" for foundation supports. The surplus or excess ground parcel-that which is actually to be sold in fee to the private party-is in no sense " necessary" for this public use, save and except a possible temporary easement for construction purposes. That condemnation of an estate less than a fee would reasonably suffice to accommodate the exhibition hall use is illustrated by the very facts of this case which admit the simultaneous divestiture of the underlying fee, subject to a government servitude coincident with its sale to a new private purchaser.

C. *Only Servitude, Not Fee, is Necessarily Taken*

A servitude which would allow the construction and placement of the exhibition hall at the fourth floor level is readily capable of independent condemnation in an eminent domain proceeding. *See* 2 Julius L. Sackman, *Nichols on Eminent Domain* § 5.04[5][a][i] (3d rev. ed.1998), at 5-298 ("Acquisition of Airspace Development Rights"); Stoebuck, 17 *Wash. Prac.* § 9.14, *supra,* at 571 (" Property-Rights Upon Land of Another (Servitudes) "); Robert R. Wright, *The Law of Airspace* (1968); *Final Draft of Model Airspace Act,* 7 Real Prop., Prob. & Tr. J. 353 (1972) (hereinafter "Model Act"); *Pearson v. Matheson,* 102 S.C. 377, 86 S.E. 1063 (1915).

***839** The facts of this case present a prototypical example of excess condemnation where the governmental entity seeks to take more property than the proposed project requires. *See* Stoebuck, 17 *Wash. Prac.* § 9.14, *supra,* at 589. Such is obviously true given the proposed public project which by its very nature defines its own "necessities. "
What is required is "reasonable" necessity.... The short answer to the question is deceptively simple: if the only justification for an eminent domain taking, the only public use or purpose the governmental entity identifies, is a certain project, then of course any land beyond what the project requires will not be taken for even an alleged public use. If we agree that 20 acres and no more are needed for a public park, then of course one more acre or one more square foot are excess.

Stoebuck, 17 *Wash. Prac.* § 9.20, *supra,* at 590.

While the maxim "cujus est solum ejus debet esse usque ad coelum" (whoever has the land possesses all the space upwards to an indefinite extent) is of ancient lineage,[FN9] early English precedent recognized a separate title in the estate of an upper

room or upper stories in houses or buildings. Such was first memorialized in connection with the privileges accorded legal scholars resident at the Inns of Court. *See* Stuart S. Ball, *Division Into Horizontal Strata of the Landspace Above the Surface*, 39 Yale L.J. 616, 620 (1930).

> FN9. The Latin maxim is traced to Accursius of Bologna who lived in the late 12th and early 13th centuries, although it has been suggested that the maxim " entered English law through the usage and influence of the Jews who came to England with the Norman Conquest in 1066." Robert R. Wright, *The Law of Airspace* 14 n.10, 15 (1968).

The growth of the Temple societies necessitated more chambers and when the societies were unable to finance this building program during the reign of Elizabeth I, the various fellows of the Temples built upon designated sites, with the chamber so erected being granted to them for life with the power in the life tenant of assigning or devising these chambers to any other fellow or fellows who would have a similar life tenancy and power of disposition.
***840** Wright, *supra*, at 68-69. Accordingly Lord Coke recognized, "[A] man may have an inheritance in an upper chamber, though the lower buildings and soile be in another, and seeing it is an inheritance corporeall it shall passe by livery." Wright, *supra,* at 69 (citing *Coke on Littleton* 48b (1628)). *See also* Model Act at 360.

Such division of property into layers of horizontal estates found favor in American ****1267** jurisprudence since the outset, Model Act at 363, where it has been recognized, for example, that " [t]he right of an owner to carve out of his property as many estates or interests (perpendicular or horizontal, perpetual or limited) as it may be able to sustain cannot be open to doubt...." *R.M. Cobban Realty Co. v. Donlan,* 51 Mont. 58, 149 P. 484, 487 (1915). *See also, e.g., Cheape v. Town of Chapel Hill,* 320 N.C. 549, 359 S.E.2d 792, 800 (1987) (" [T]hey argue ... the holder of a fee simple may not divide his fee horizontally, ... [but] absent some specific restraint, the holder of a fee simple may divide his fee in any manner he or she chooses."); *cf.* Model Act at 363. Our jurisdiction has also long recognized the validity of an estate in property described by a space in the air. *See, e.g., Taft v. Washington Mut. Sav. Bank,* 127 Wash. 503, 221 P. 604 (1923) (city may vacate part of street easement suspended at an altitude above the street itself).

D. *Air Space May Be Taken in Eminent Domain*

Since air space can be transferred, it can be taken in eminent domain. Model Act at 365, 366; *cf.* Stoebuck, *Theory of Eminent Domain, supra,* at 606 ("The conclusion is that 'property' in eminent domain means every species of interest in land and things of a kind that an owner might transfer to another private person."). *See also* Model Act at 365; 2 *Nichols* § 5.04[5][a], *supra,* at 5-298, and 3 Nichols § 11.02[2], supra, at 11-30. Some eminent domain statutes ***841** expressly reference taking air space as well. [FN10] Moreover an air space estate is even fair game for an action in inverse condemnation. *See, e.g., Hillsborough County Aviation Auth. v. Benitez,* 200 So.2d 194, 199 (Fla.App.1967).

> FN10. *See, e.g.*, RCW 8.25.073 (costs to condemnee for taking "air space corridor"); RCW 47.52.050(2) (government may condemn "air space corridor" above or below highway); RCW 47.12.120 (department may lease air space).

Applying the aforementioned principles to the case at bar, the conclusion must follow that all that was truly necessary for the government to condemn was a servitude for the air space over the subject property in conjunction with that easement necessary for foundation supports and temporary construction activities. However, the actual condemnation was greatly in excess of that. Such resulted in what the trial court found to be a "surplus " ground estate which the government would resell to a private entrepreneur for recoupment of a portion of its investment. Such our constitution plainly prohibits as well.

III.

Recoupment

Seizure of private property for recoupment sale represents the worst of all possible eminent domain worlds since (1) it delivers condemned property to private use and (2) necessarily represents a seizure of property which is excess to legitimate public use.

A. *Recoupment Defined*

As found by the trial court, the unnecessary or " surplus" portion of the property to be condemned is, as part of the same transaction, to be resold to a private entrepreneur for his private use subject only to an easement servitude for the aerial estate reserved in the government. In the parlance of eminent domain jurisprudence such is normally referenced as a "recoupment" sale, and universally frowned upon as an unconstitutional condemnation in excess of that which is necessary for public use (except in those situations where peculiar provisions of a state constitution ***842** expressly authorize it). "Thus, the basis of recoupment theory is that the government may finance public improvements by condemning more land than is needed and then sell the surplus at a price enhanced by the improvement. The aim here is to recoup the cost of the public project." 2A *Nichols* § 7.06[7][d], *supra,* at 7-184.

B. *Taking for Recoupment Violates State Constitution*

The leading recoupment case is *City of Cincinnati v. Vester,* 33 F.2d 242, 68 A.L.R. 831 (6th Cir.1929) , *aff'd,* 281 U.S. 439, 50 S.Ct. 360, 74 L.Ed. 950 (1930). Cincinnati there sought to condemn land in addition to ****1268** that necessary to widen a street. The City claimed the additional properties condemned were mere remnants, or were alternatively necessary to beautify the improvement. But the court rejected these arguments, finding the excess taking was a recoupment, not a public use, and thus an unconstitutional taking of more private property than that necessary for the public use. *See also* 2A *Nichols* § 7.06[7][d], *supra,* at 7-186. *Accord In re Opinion of the Justices,* 204 Mass. 607, 91 N.E. 405 (1910) (eminent domain could not be used for development of commercial and industrial center because the motive for excess taking was profit).

So too a New York State Commission report published in 1972 reiterated the nearly universal view that courts have taken a "dim view of control of private property by the government for the sole purpose of making a profit by resale ... [and] not only deem it highly improper but also question the constitutionality of the state using the power of eminent domain to take for a future speculative use." 2A *Nichols*, § 706[7][d], *supra,* at 7-186 (quoting Report, New York State Commission on Eminent Domain 46, 47 (1972)). *Accord* E.L. Strobin, Annotation, *Right to Condemn Property in Excess of Needs for a Particular Public Purpose*, 6 A.L.R.3d § 6[b] at 311 (In general, American courts have viewed recoupment schemes with disfavor.); Robert H. Freilich & Stephen P. Chinn, ***843** *Transportation Corridors: Shaping and Financing Urbanization Through Integration of Eminent Domain, Zoning and Growth Management Techniques*, 55 UMKC L.Rev. 153, 205 (1987) (" The exercise of excess condemnation solely for recoupment purposes has consistently met with judicial disapproval.").

Only six state constitutions [FN11] authorize the condemnation of land in excess of that actually needed for public use, and Washington is not one of them.

FN11. Massachusetts, Missouri, New York, Ohio, Rhode Island, and Wisconsin, and three of these six-Massachusetts, New York, and Rhode Island-require that an excess condemnation be specifically approved as such by the legislative body. Massachusetts Const. pt. 1, art. 10: "The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets authorize the taking in fee by the commonwealth, or

by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions."

Missouri Const. art. 1, § 27: "**Acquisition of excess property by eminent domain disposition under restrictions.**

"That in such manner and under such limitations as may be provided by law, the state, or any county or city may acquire by eminent domain such property, or rights in property, in excess of that actually to be occupied by the public improvement or used in connection therewith, as may be reasonably necessary to effectuate the purposes intended, and may be vested with the fee simple title thereto, or the control of the use thereof, and may sell such excess property with such restrictions as shall be appropriate to preserve the improvements made."

New York Const. art. 18, § 8: The government "may be empowered by the legislature to take property necessary for any such purpose but an excess of that required for public use after such purpose shall have been accomplished."

Ohio Const. art. 18, § 10: The government "may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made."

Rhode Island Const. art. VI, § 19: The government may take in fee, "more land and property than is needed for actual construction in the establishing ... public highways ... [a]fter so much of the land and property has been appropriated for such public highway ... as is needed therefor, the remainder may be held ... or may be sold or leased for value ... and in case of any such sale or lease, the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same...."

Wisconsin Const. art. XI, § 3a: The government "may convey such real estate thus acquired and not necessary for such improvements ... so as to protect such public works and improvements."

I therefore submit seizure of private property in our jurisdiction for recoupment sale insults our Declaration of Rights and subverts our enhanced constitutional guarantee ***844** against "... great injustice, and often the most serious oppression." [FN12]

FN12. *See* note three, *infra.*

****1269** IV.

Consequences

The majority opinion yields two consequences, one anticipated and one probably not.

The anticipated one is that the absolute state constitutional prohibition against taking private property for private use is judicially repealed. This is necessarily the case because of the majority claim that a public use for one level of floor space, or floor plan, justifies public seizure of everything above it and below it for private use, even recoupment sale.

The second consequence, probably unintended, is that where the government desires to condemn only a horizontal servitude at some elevation so as to restrict the level of public compensation to the private property owner to that which is only " necessarily" acquired (such as a height restriction in an historical district, for example [FN13]), the private property owner will now be able to claim that the

public condemnation, and hence compensation, is inappropriately limited to less than the entire fee estate consistent with the resurrected maxim cujus est solum, ejus est usque ad coelum. I can see no principle inherent in today's opinion, however, which would defeat such an argument because if it is necessary to condemn the entire fee to use but a condominiumized aerial estate because that result is pleasing to the government, there is no reason the same result would not follow simply when it pleases the private land owner.

> FN13. I assume for the purpose of this example that such is an act of eminent domain rather than an exercise of the police power.

For these reasons I do dissent, would reverse the order of condemnation because it takes private property for private use and, additionally, seizes private property in excess of that which is necessary for public use.

***845** MADSEN J., concurs.
Wash.,1998.
State ex rel. Washington State Convention and Trade Center v. Evans
136 Wash.2d 811, 966 P.2d 1252

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West Reporter Image (PDF)

96 Wash.2d 616, 638 P.2d 549

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Supreme Court of Washington, En Banc.
In the Matter of the Petition of The CITY OF SEATTLE.
In re The WESTLAKE PROJECT.
No. 47556-3.
Dec. 24, 1981.

Owners of properties within municipal improvement project sought declaration that ordinance adopting the project and providing for condemnation was invalid. The Superior Court, King County, Frank D. Howard, J., found that the project was not authorized by statute and did not constitute a public use, and the city appealed. The Supreme Court, Rosellini, J., held that where primary purpose of municipal improvement, for which land was sought to be condemned, was to promote retail goals of the project and to forestall core city decay, such was not a "public use" for purpose of eminent domain and, also, there was no statutory authority for such undertaking, notwithstanding that part of project included a public square, park, museum and off-street parking, for which functions a city has eminent domain authority.
Affirmed.
Stafford, J., filed concurring opinion.
Utter, J., filed dissenting opinion in which Dimmick and Dolliver, JJ., joined.

West Headnotes

[1] KeyCite Notes

118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak392.1 k. In General. Most Cited Cases
(Formerly 118Ak392)

Appeal from judgment declaring invalid ordinance adopting municipal improvement project and providing for condemnation was not moot, notwithstanding that during pendency of the action contracts forming an integral part of the project had expired by their own terms where court was assured that city intended to proceed with the undertaking if it were found valid and city was confident that it could renew the expired contracts. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[2] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases

Acquisition of land through eminent domain proceedings must be for a public use. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[3] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases

Question whether proposed acquisition is for public use is a judicial question, although a legislative declaration will be accorded great weight. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[4] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases

Although there was no legislative pronouncement on whether proposed condemnation was for public use, city council's declaration to effect that project was required for health, safety, convenience and welfare of the public and that the property to be acquired was for public use was entitled to judicial respect. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[5] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases

148 Eminent Domain KeyCite Notes
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation. Most Cited Cases

For proposed condemnation to meet constitutional requirements the court must find that the use is really public, that the public interests require it, and the that property appropriated is necessary for the purpose. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[6] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases

Fact that public interest may require a project for which land is sought to be condemned is insufficient to constitute the project a "public use" within meaning of eminent domain provision of the Constitution if the use is not really public. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[7] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases

A beneficial use is not necessarily a "public use" within meaning of eminent domain provision of the Constitution. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[8] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k60 Taking for Private Use
148k61 k. In General. Most Cited Cases

If a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[9] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases

Where purpose of a proposed acquisition is to acquire property and devote only a portion of it to truly public uses, the remainder to be rented or sold for private use, the project does not constitute public use. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[10] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k18.5 k. Urban Renewal; Blight. Most Cited Cases

Where primary purpose of municipal improvements for which land was sought to be condemned was to promote retail goals of the project and to forestall core city decay, such use was not a "public use" for purpose of eminent domain and, also, there was no statutory authority for such undertaking, notwithstanding that part of project included a public square, park, museum and off-street parking, for which functions a city has eminent domain authority; were the retail functions only incidental to the other uses a different question would be presented. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9; West's RCWA 8.12.030, 35.21.020, 35.21.660, 35.22.302, 35.86.030.

[11] KeyCite Notes

148 Eminent Domain

148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k9 k. To Municipality. Most Cited Cases

A municipal corporation's power to condemn is delegated to it by the legislature and must be conferred in express terms or necessarily implied. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[12] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k8 k. Construction and Operation of Legislative Acts in General. Most Cited Cases

Statutes which delegate the state's sovereign power of eminent domain to its political subdivisions are to be strictly construed. West's RCWA 8.12.030, 14.08.030, 35.21.020, 35.21.660, 35.22.280(6), 35.22.302, 35.22.305, 35.23.455, 35.24.310, 35.86.030, 35.92.010, 53.04.010, 53.08.020, 53.08.080; West's RCWA Const.Art. 1, § 16 as amended by Amend. 9; Laws Ex. Sess. 1925, ch. 42.

[13] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k8 k. Construction and Operation of Legislative Acts in General. Most Cited Cases

Statutory grant of eminent domain power is not to be so strictly construed as to thwart or defeat apparent legislative intent or objective. West's RCWA 8.12.030, 14.08.030, 35.21.020, 35.21.660, 35.22.280(6), 35.22.302, 35.22.305, 35.23.455, 35.24.310, 35.86.030, 35.92.010, 53.04.010, 53.08.020, 53.08.080; West's RCWA Const.Art. 1, § 16 as amended by Amend. 9; Laws Ex. Sess. 1925, ch. 42.

[14] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases

Not every legislative declaration of public use will survive scrutiny as the court has the constitution responsibility of determining where the use is really public. West's RCWA 8.12.030, 35.22.305, 35.23.455, 35.24.310, 35.92.010; West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[15] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k9 k. To Municipality. Most Cited Cases

Power of eminent domain, when exercised by a municipality, must be derived from an express legislative grant or necessarily implied. West's RCWA 8.12.030, 35.22.305, 35.23.455, 35.24.310, 35.92.010; West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[16] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In General. Most Cited Cases

Language "for any other public use" as used in eminent domain statute is restricted to uses which are the same kind as those enumerated. West's RCWA 8.12.030, 35.22.305, 35.23.455, 35.24.310, 35.92.010; West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[17] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k17 k. In General. Most Cited Cases

There is no statutory authority to establish or to condemn property for an urban "focal point" or an urban shopping center or facilities to be leased for private use as retail establishments, restaurants or theatres. West's RCWA 8.12.030, 35.22.305, 35.23.455, 35.24.310, 35.92.010; West's RCWA Const.Art. 1, § 16 as amended by Amend. 9.

[18] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k17 k. In General. Most Cited Cases

While legislature has authorized leasing of areas above the surface of the ground of real property owned by it and limited to a particular use, it has not authorized city to acquire property for purpose of leasing it for such uses. West's RCWA 35.22.302.

[19] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k18.5 k. Urban Renewal; Blight. Most Cited Cases

Although motives of city council were not questioned and it was found that city did not act arbitrarily, capriciously or fraudulently in planning municipal improvement project such did not detract from finding that the project, which was designed to enhance and forestall "flight to the suburbs" by improving retail aspects of core city, was not a public use within meaning of eminent domain power. West's RCWA Const.Art. 1, § 16 as amended by Amend. 9; West's RCWA 8.12.030, 35.21.020, 35.21.660, 35.22.302, 35.86.030.

***618 ****551** Douglas N. Jewett, Seattle City Atty., Ellen D. Peterson, Asst. City Atty., Wickwire, Lewis, Goldmark & Schoor, O. Yale Lewis, Jr., William H. Block, Seattle, for appellant.
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Washington Coalition of Citizens With Disabilities, James R. Ellis, Catherine B. Roach, Sweet, Dussault, Neff & Gibbs, P.S., William L. E. Dussault, Seattle, for amicus curiae.

ROSELLINI, Justice.
This proceeding concerns a municipal improvement called the Westlake Project, proposed by the City of Seattle, a first-class city. The action was begun by the respondents, who are owners and lessees of properties located within the area which the project would embrace. They sought a judgment declaring invalid the ordinance adopting the project and providing for condemnation of property within the area (Seattle City Ord. 108591). Before the suit ****552** was heard, the City initiated condemnation proceedings to acquire plaintiffs' property, and the actions were consolidated.

After hearing extensive evidence, the trial court found, ***619** inter alia, that the project was not authorized by statute, and did not constitute a public use. A number of the court's rulings are challenged on this appeal, but inasmuch as we affirm the trial court upon these two grounds, we do not reach the remaining issues.

[1] The respondents ask the court to dismiss the appeal as moot. They point to the fact that during the pendency of this action, contracts which form an integral part of the project, particularly a contract with the Seattle Art Museum, have expired by their own terms. The court is assured, however, that the City intends to proceed with the undertaking if the court declares it valid. It is confident that it can renew the contract with the art museum and secure the other contracts needed to complete the project. That being the case, the matter is still in controversy and is not moot.

Pine Street in Seattle, between 4th and 5th Avenues, is fronted by retail stores which have been there for many years. The monorail, an elevated passenger service which runs to the Seattle Center, has its downtown terminal at that point. Westlake Avenue has been closed to traffic in recent years and converted to a mall, where public gatherings take place from time to time. There is on-street parking on Pine Street in this area; 60 percent of city buses travel to this point to disgorge shoppers, and the area is in the heart of the retail shopping center, three large department stores being situated in the immediate vicinity. The Mayflower Hotel stands at 4th and Olive, and just south of it is a large piano store. There is presently a walkway, called Fidelity Lane, which runs through the buildings in this block to make it easier for shoppers to walk from Frederick and Nelson on 5th Avenue to The Bon Marche on 4th Avenue.

The City proposes, in its Westlake Project, to acquire an area roughly between 4th and 5th on the east and west, and between Stewart and Pine on the north and south. The project would include the Times Square Building, considered an architecturally and historically significant building. ***620** A history of the development of the project follows:

The 1973 report of Mayor Wes Uhlman's committee which studied the Westlake Mall area stated that the retailing function of the area should be strengthened to forestall the decay experienced by the retail cores of other cities. The other objective cited was the creation of public space, aesthetically satisfying, which could provide a center for general pedestrian-oriented amenities both day and night. The committee concluded, however, that this objective should not be at the expense of the retail function. Westlake, the report said, offered a unique opportunity for locating this space in that it was centrally located in the middle of a high-density retail population and included a substantial public space at present.

It was proposed that the project should be designed and accomplished jointly with interested property owners and businessmen, because of the interdependence of the two goals.

Following his election, Mayor Royer, in 1978, appointed a citizens' committee to study the Westlake Project. The mayor proposed a project concept which substituted the Seattle Art Museum for hotel space which had been previously contemplated. Under the proposed plan, the museum, a private nonprofit corporation, will occupy the space rent free, as it presently occupies buildings owned and maintained by the City in Volunteer Park and the Seattle Center.

Pursuant to ordinance, the Department of Community Development advertised for developers to prepare plans for the project. The application of Mondev U.S.A., Inc. (Mondev) was accepted.

In August 1979, the Westlake Development Authority (formed pursuant to RCW 35.21.660 and governed by a council appointed by the mayor), the Seattle Art Museum, and Mondev entered into a tripartite agreement which established the parties' ***553*** responsibilities for implementation of the project, specifying how the project was to be constructed, leased, operated and maintained.

621 After at least 13 public committee meetings and an evening public hearing at which the plaintiffs testified, the City adopted ordinances providing for the execution of a contract between the City and the Westlake Development Authority and providing that the City acquire, construct and equip through the Authority the revised project, with Mondev as the developer. In 1980 Westlake Associates, a limited partnership composed of Daon Corporation, Mondev and the Seattle Art Museum was substituted for Mondev as developer. An amended tripartite agreement was made between the Westlake Development Authority, the Seattle Art Museum and Westlake Associates.

Architectural plans for the project remain at the "preschematic" stage, but currently show the following project elements:

A. A triangular public park of approximately 25,000 square feet;

B. Additional exterior public open spaces, including covered arcades, sidewalks, plazas, rooftop garden and courtyard, and a rooftop terrace;

C. A public parking garage with short-term parking spaces;

D. A new monorail terminal of approximately 4,600 square feet accessible to the public;

E. An art museum in the new structure (approximately 130,000 gross square feet) and the adjoining Times Square Building devoted to galleries, children's museum, auditorium curatorial spaces, museum shop, library, and administrative and support functions;

F. Retail and cinema space (approximately 186,000 square feet of gross leasable space) occupying four floors of the new building; and

G. Interior circulation systems of approximately 45,000 square feet.

The ordinance declared that the construction of the proposed project was required for the health, safety, convenience and welfare of the public, that the property to be acquired was for a public use, and that the expenditure of ***622*** funds therefor was for a public purpose.

To fully understand the scope of the project, it is necessary to set forth the participants and the method of financing.

Westlake Associates is a Washington limited partnership composed of Daon Corporation as general partner with a 50 percent ownership interest, the Seattle Art Museum as a limited partner with a 30 percent ownership interest, and Mondev as a limited partner with a 20 percent ownership interest.

The financial structure of the Westlake Project was principally determined by six contracts: (1) the agreement between the City of Seattle and the Westlake Development Authority for the development of the Westlake Project; (2) the amended tripartite agreement for the Westlake Project between the Westlake Development Authority, the Seattle Art Museum and Westlake Associates; (3) the Urban

Development Action Grant of April 4, 1979 as amended; (4) the limited partnership agreement of Westlake Associates; (5) the contract for project coordination services; and (6) the City-Museum Agreement 1931 as amended.

Those contracts obligate the City to acquire all properties necessary for the project, and transfer all properties north of Pine Street to the Westlake Development Authority, either by deed or by 99-year lease; to build and maintain a proposed park south of Pine Street; to pay all costs of relocating businesses, moving utilities and revising traffic patterns; to build a temporary monorail terminal; to operate and maintain the permanent monorail terminal; and to transfer $1.26 million of proceeds from city bonds to the Westlake Development Authority.

As of April 1980, the City estimated its cost of the Westlake Project would equal $17,809,000. The City intended to finance its obligations by issuance of $12.6 million of general obligation bonds, use of $975,000 ***554** from the Forward Thrust bond issue, receipt of $3,463,000 of Urban Development Action Grant funds and $771,000 from other sources.

***623** The Westlake Development Authority agreed to have the project built in accordance with plans prepared by Mitchell/Giurgola in September 1978, and to pay its net revenues, if any, from the project to the City. Westlake Associates has no obligation to the City of Seattle to repay any city expenses.

The Westlake Development Authority is required to renovate the Times Square Building and lease the entire building without cost to the Seattle Art Museum for an initial term of 66 years for use as part of the museum facility, allowing the museum to sublet the remaining commercial space in that building to others as a source of income.

In the new building to be constructed, the Westlake Development Authority is obligated to lease to the museum air rights, storage and other space for an initial term of 66 years upon which the museum will construct its new museum facility above the new shopping center. The "consideration" for the two museum leases is that the art museum is obligated to build and maintain its new museum, keeping it open to the public according to lease provisions, maintain the north plaza, the Times Square Building and the common spaces adjoining its museum space. It is to pay a share of the cost of maintaining the elevators and escalators, its agreed share of the common costs, and taxes on the Times Square Building. The museum is required to pay no rent for the lease of air rights or the Times Square Building.

The Westlake Development Authority is obligated to lease to the developer for a period of 66 years the air rights (together with subterranean rights for retail storage, loading docks and mechanical rooms) necessary for it to build its retail shopping center. It is also obligated to construct the parking garage and lease it to the developer for 20 years; to construct the sidewalks, the arcades, the north and south plazas, the roof gardens off of the fourth floor of the shopping complex and the lowest museum floor, and the monorail terminal, and to pay 21.2 percent of the cost of interior malls, elevators, escalators, and other common ***624** costs, and 20.5 percent of indirect costs of the project, the developer to pay the remainder.

The developer is obligated to build and maintain the retail shopping center which will occupy 31/2 floors of the new building. Until the developer's revenues from the retail shopping center exceed $4 million, the developer must pay the Westlake Development Authority for the air rights on which it builds the shopping center the greater of $50,000 plus the Westlake Development Authority's debt service costs from construction of the Authority's portion of the improvements on the property (except for those costs attributable to the garage construction) or $375,000. After the developer's revenues from the retail shopping center exceed $4 million annually, it must pay a percentage of those excess revenues to the Westlake Development Authority.

For the first 4 years of the garage lease, the developer must pay the greater of the Westlake Development Authority's debt service costs attributable to construction of the garage or $251,000. Thereafter, if the developer operates the garage itself, it must pay the Westlake Development Authority the greater of the Authority's debt service attributable to the garage or $251,000 or 55

percent of its gross revenues. A different formula applies if the developer sublets the garage to an operator.

Const. art. 1, s 16 (amend. 9) provides:

s 16 EMINENT DOMAIN. Private property shall not be taken for private use ... Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: ...

(Italics ours.)

[2] [3] The acquisition of land through eminent domain proceedings must be for a ***555** public use. Under the constitutional provision, the question whether the proposed acquisition is for such a use is a judicial question, although a ***625** legislative declaration will be accorded great weight. Des Moines v. Hemenway, 73 Wash.2d 130, 437 P.2d 171 (1968).

[4] Here, there has been no legislative pronouncement on the subject. Still the declaration of the city council to the effect that the project was required for the health, safety, convenience and welfare of the public and that the property to be acquired was for public use is also entitled to respect. However, the evidence which was presented to the trial court did not substantiate the City's declaration.

[5] In order for a proposed condemnation to meet the constitutional requirement of Const. art. 1, s 16, the court must find (1) that the use is really public, (2) that the public interests require it, and (3) that the property appropriated is necessary for the purpose. King County v. Theilman, 59 Wash.2d 586, 593, 369 P.2d 503 (1962).

It is stipulated that this is not an urban renewal case, as in Miller v. Tacoma, 61 Wash.2d 374, 378 P.2d 464 (1963).

According to exhibit 4, the mayor's Westlake Advisory Committee in 1973 established the following goals for the Westlake Project:

1. Westlake Goals and Opportunities. The Westlake area offers an opportunity to achieve the following major objectives of the City:

(a) Retailing. At present the primary function of the Westlake area is retailing. This function is highly desirable and should be strengthened to forestall the decay experienced by other cities' retail cores. The general aim should be to make this retail core the finest shopping center in the Pacific Northwest with both local and regional attraction. Measures to accomplish this goal include encouraging additional investment, ...

(b) Public Space. Seattle, as a major urban center, needs a downtown focus point, an aesthetically-satisfying space as a point of public pride which can provide a center for general pedestrian-oriented amenities, both in the daytime and at night. Westlake offers a unique opportunity for locating this space in that it is centrally located, in the middle of a high-density retail population and includes a substantial public space at present.

2. Interdependence of Goals. A project to achieve these goals in the Westlake area can be accomplished only by a ***626** cooperative effort of city and private interests. Not only will retail goals be defeated if the public space is designed so that it impairs the retail function, but proper design and development of surrounding commercial structures is essential to success of the public space. Since

each aspect of the project should not only detract but enhance the others' function, any project in the area must be jointly designed and accomplished.

(Exhibit 4, at 3-4.) These goals have remained the principal goals of the Westlake Project throughout all subsequent planning, according to the findings of the trial court.

The witnesses who testified for the City at the trial upon whom the court relied for its findings maintained that the project would not be feasible unless there was a viable shopping center. For example, one witness testified that the goal and objective of the City was to

"(d)evelop a downtown focal point which is an aesthetically satisfying space and fosters a sense of public pride and a retail goal (to) strengthen the retail core to become the finest shopping center in the Pacific Northwest with both local and regional attraction."

(Report of Proceedings 612-13.)

The court found that:

5. The retail shops within the Westlake Project are a substantial element of the project and are an essential part of the Westlake Project and this urban focal point. The retail element of the project cannot be separated from the Project's other elements in the project as now designed to make the project economically ***556** feasible and to accomplish the intended purpose of the design.

21. The sidewalks, arcades and interior circulation spaces in the Westlake Project are similar to and serve a similar function to the sidewalks, arcades and interior circulation spaces in private shopping centers such as Northgate and Southcenter, stores and other mixed use buildings, including allowing for circulation of customers, providing for display of goods for sale, connecting the retail shops, acting as a "pedestrian street," providing for relaxation and cultural events, and providing amenities which draw customers.

22. The roof gardens, plazas, museum, monorail terminal ***627** and park spaces will stimulate pedestrian traffic in the area. Pedestrian traffic is of benefit to retail stores.

37. One of the purposes of the Westlake Project was to create a project at the Westlake site which would not damage the surrounding retail uses and would aid in strengthening the 26-block area of Seattle identified as the retail core. It was also intended to function with the nearby department stores (The Bon Marche, Frederick & Nelson and Nordstrom) to create a shopping center with both local and regional attraction.

45. If the retail space is removed or reduced in size, the Project would not accomplish its intended purpose and would not be financially feasible. Some of the other uses could be eliminated or modified and the project could still accomplish its designed function.

(Clerk's Papers 694, 697, 700, 701.)

[6] [7] It may be conceded that the Westlake Project is in "the public interest". However, the fact that the public interest may require it is insufficient if the use is not really public. A beneficial use is not necessarily a public use. State ex rel. Oregon-Washington R. R. & Nav. Co. v. Superior Court, 155 Wash. 651, 657-58, 286 P. 33 (1930); Hogue v. Port of Seattle, 54 Wash.2d 799, 825, 831, 837-38, 341 P.2d 171 (1959).

Only the constitutions of Arizona, Colorado and Missouri have provisions similar to the Washington State Constitution. Like the Washington Constitution, the question whether the contemplated use be really a public use shall be a judicial question and determined as such without regard to any legislative assertion. Cases from other jurisdictions holding that a legislative pronouncement of public use is controlling, are not helpful.


[8] If a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked. State ex rel. Puget Sound Power & Light Co. v. Superior Court, 133 Wash. 308, 233 P. 651 (1925).


[9] Therefore, where the purpose of a proposed acquisition is ***628** to acquire property and devote only a portion of it to truly public uses, the remainder to be rented or sold for private use, the project does not constitute public use.

Here the trial court found as a fact, upon convincing evidence, that the retail shops were a substantial element of the project, essential to its functioning; that the sidewalks, arcades and interior circulation spaces in the project are similar to and serve a similar function to those in private shopping centers; that the public features will stimulate pedestrian traffic in the area, benefiting the retail stores and that these stores were intended to function with the nearby department stores to create a shopping center with both local and regional attraction.

The City cites In re Port of Seattle, 80 Wash.2d 392, 495 P.2d 327 (1972), contending that it supports the City's alleged right to acquire land by condemnation for lease to private individuals for retail shopping businesses. In that case the Port sought to acquire land adjoining the airport for use for air cargo storage. It appeared that some of these facilities might be leased to ***557** private parties. We found that the port district had express statutory authority to acquire land for use for airport purposes, including storage and transfer facilities (RCW 53.04.010, RCW 53.08.020, and RCW 14.08.030). Also we found that the Port had express statutory authority to lease its facilities to private parties. RCW 53.08.080. While private entrepreneurs might be utilized to effectuate the Port's purpose, that purpose-air cargo storage and transfer-was nevertheless a public one. We distinguished Hogue v. Port of Seattle, 54 Wash.2d 799, 341 P.2d 171 (1959), where this court had held that the same port district had no authority to condemn land for industrial development, pointing out that there the proposed use was private in nature; the proposal was to sell the land to private parties rather than to lease it, and that the proposed construction of air cargo facilities was an integral part of an airport operation which served a public purpose. Also, we pointed out in a footnote that the impact of Hogue had been substantially modified by the adoption of article ***629** 8, section 8 (amendment 45) to the Washington Constitution, which reads in pertinent part: "The use of public funds by port districts in such manner as may be prescribed by the legislature for industrial development or trade promotion ... shall be deemed a public use for a public purpose ..."

Here there is no express statutory authority for the proposed project-a retail shopping center-and that purpose is not a public one. Furthermore, there is no constitutional provision evidencing the people's understanding that such undertakings constitute a public purpose.

We conclude that the proposed project contemplated a predominantly private, rather than public, use.


[10] The City strenuously argues that since it has the statutory authority to condemn land for public squares, parks or museum purposes, and off-street parking, this project is a public use. Were the retailing functions only incidental to those uses, a different question would be presented. However, the evidence shows, as the trial court found, that the primary purpose of the undertaking was to promote the retail goal. Not only is this not a public use, but we find no statutory authority for such an undertaking.


[11] 
[12] 
[13] A municipal corporation's power to condemn is delegated to it by the legislature and must be conferred in express terms or necessarily implied. Statutes which delegate the State's sovereign power of eminent domain to its political subdivisions are to be strictly construed. Des Moines v. Hemenway, 73 Wash.2d 130, 437 P.2d 171 (1968); State ex rel.

Devonshire v. Superior Court, 70 Wash.2d 630, 424 P.2d 913 (1967). However, as we said in Devonshire, a statutory grant of such power is not to be so strictly construed as to thwart or defeat apparent legislative intent or objective.

The appellant has directed our attention to no statute which evidences a legislative intent that municipalities can erect a retail shopping facility or condemn land for that purpose.

We said in Des Moines that a statute delegating ***630** eminent domain power to a municipal corporation, containing both specific enumerations and general provisions, should be interpreted so no portion of it is superfluous, void, or insignificant, and when the specific enumerations of power are followed by words granting general power, the specific enumerations govern the character or nature of the subject matter to be included within the words granting general powers.

Speaking of RCW 8.12.030 and RCW 35.24.310 (specifically granting to third-class cities the power of eminent domain), we said that the general language "any other public use" and "any other public purpose" meant uses and purposes "of the same character or nature as those uses and purposes enumerated in the statutes, i.e., public uses and purposes." Des Moines, 73 Wash.2d at 134-35, 437 P.2d 171. In that case it was sought to condemn tidelands for a marina. It was conceded that a marina is a public use. The use in that case was authorized by RCW 35.23.455, although that statute ****558** did not expressly authorize condemnation. Since it was the evident legislative intent to grant such power under the general language of RCW 8.12.030 and 35.24.310, read in conjunction with RCW 35.23.455, the city was authorized to condemn land for that purpose.

In Devonshire, the City of Seattle, pursuant to express statutory authority (RCW 35.22.305, Laws of 1965, ch. 132, s 1), had created a separate municipal department for the administration, management and control of a civic center, which had then been constructed as a site for the Seattle World's Fair. The statute provided for authority to operate public transportation facilities "heretofore or hereafter erected primarily to serve such civic center." Taking this provision in conjunction with RCW 8.12.030, giving the power of eminent domain with respect to specified uses and "any other public use", we concluded that the legislature must have envisioned that the city would acquire the monorail system and must have intended that it would be vested with the power to purchase or condemn, if required, such appurtenant easements as were necessary for its ***631** operation.

In King County v. Seattle, 68 Wash.2d 688, 414 P.2d 1016 (1966), we strictly construed RCW 8.08.010-.080, authorizing counties to condemn land and property for public use within their boundaries, holding that it does not give the right to condemn land belonging to the state or its subdivisions, regardless of the use to which it is to be put. On the other hand, in Seattle v. State, 54 Wash.2d 139, 338 P.2d 126 (1959), a city's authority to condemn, for waterworks purposes, state lands not devoted to a public use was recognized, where a statute expressly conferred that power.

In Tacoma v. Welcker, 65 Wash.2d 677, 399 P.2d 330 (1965), the city, in an effort to preserve the purity of the Green River which supplied the city's water needs, brought actions to condemn certain privately owned property lying within the watershed. It was contended that the city had no authority to condemn for that purpose. However, RCW 8.12.030 authorized it to condemn land for the purpose of protecting its supply of fresh water from pollution, and RCW 35.92.010 bestowed a similar power. It was not there denied that the city had the power of eminent domain to protect its water supply, but rather that its decision to exercise that power over the particular properties in question was arbitrary and capricious. It was conceded that there was no polluting of the stream at the moment, but the city desired the property in order to guard against future contamination. We held that the city acted reasonably in determining that the taking was necessary.

Spokane v. Williams, 157 Wash. 120, 288 P. 258 (1930) is another case in which this court considered the scope of a city's power to condemn private property. The City of Spokane sought in that case to condemn land outside its limits for airport purposes. Although the state specifically gave to cities the authority to acquire, maintain and operate airports, and to purchase, condemn or lease property therefor, declaring the same to be a public use (Laws of 1925, Ex. Sess., ch. 42, p. 30), the property owners contended that the authority given could only be exercised within the city's ***632** boundaries. This court held, however, that the statute should be read in conjunction with Laws of

1890, p. 215, s 5 (now RCW 35.22.280(6)), which gave the city power to appropriate private property within or without its corporate limits for its corporate purposes.

In Miller v. Tacoma, 61 Wash.2d 374, 378 P.2d 464 (1963), we upheld a legislative declaration of public use, even though private individuals would ultimately benefit from the condemnation authorized in that case, which was designed to correct urban blight. There the power to condemn was specifically conferred in the act which defined the evils to be corrected and gave cities the power to determine the existence of blighted areas within their environs.


[14] Of course, as we recognized in that case, not every legislative declaration of public use will survive scrutiny by the court, which has, under the constitution, the responsibility of determining whether the ***559** "use be really public." Thus, in Hogue v. Port of Seattle, 54 Wash.2d 799, 341 P.2d 171 (1959), we found invalid a portion of a statute providing for the establishment of industrial development districts, finding that it authorized the acquisition of land for private purposes.

Cases from other jurisdictions which have come to our attention, in which courts have upheld the acquisition of property under the power of eminent domain for lease to private parties, have all involved statutory grants of specific powers. See Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (housing redevelopment); Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957) (industrial development); Lerch v. Maryland Port Auth., 240 Md. 438, 214 A.2d 761 (1965) (trade center); Courtesy Sandwich Shop, Inc. v. Port of New York Auth., 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963) (trade center).


[15] In holding that the power of eminent domain, when exercised by a municipality, must be derived from an express legislative grant or necessarily implied, this court applies the general rule. See 11 E. McQuillin, Municipal Corporations s 32.15, .16 (3d ed. rev. 1977); 29A C.J.S. ***633** Eminent Domain s 22 (1965).


[16] It will be seen that in all of the cases where this court has found an implied grant of the power of eminent domain, there has been an express legislative grant of the authority to undertake the project, thus evidencing a legislative finding that the particular action authorized serves a public use. Taken together, these cases stand for the proposition that the general language of RCW 8.12.030-"for any other public use"-is restricted to uses which are of the same kind as those enumerated in the section or which are specifically authorized by the legislature.

Here, the proposed project includes a number of elements for which the exercise of the power of eminent domain is expressly authorized. The City has the statutory authority to condemn property for a public square (RCW 8.12.030) and that portion of the project which is reserved for a public parking garage (at least at ground level) would fit that description. See definitions of "public square" in 35 Words & Phrases, Public Square (1963), which describe a square as an open space, sometimes occupied by a public building, such as a courthouse. And see 10 E. McQuillin, Municipal Corporations s 28.38 (3d ed. rev. 1981), where it is said that public squares are held in trust for the use of the public. Webster's Third New International Dictionary 2214 (1966) defines a square as an "open place or area formed at the meeting of two or more streets".

Condemnation for parks is also authorized under RCW 8.12.030, and RCW 35.86.030 grants the power of eminent domain for purpose of acquiring real property for off-street parking facilities, to provide parking for persons using such parks or civic center facilities. Power to condemn for monorail purposes has also been granted. See State ex rel. Devonshire v. Superior Court, 70 Wash.2d 630, 424 P.2d 913 (1967). Finally, the power to condemn for art museum purposes is contained in RCW 35.21.020.

[17] There is, however, no statutory authority to establish or to condemn property for an urban "focal point", or an urban shopping center, or facilities to be leased for private***634*** use as retail establishments, restaurants, or theatres.

[18] While the legislature has authorized the leasing of areas above the surface of the ground, of real property owned by it and not limited to a particular use (RCW 35.22.302), it has not authorized a city to acquire property for the purpose of leasing it for uses such as these.

Were these private uses only incidental to the public uses for which the land is condemned, a different question would be presented. See Miller v. Tacoma, supra; In re Port of Seattle, 80 Wash.2d 392, 495 P.2d 327 (1972).

[19] While the motives of the city council are not questioned, and the court found as a fact that the City did not act arbitrarily, capriciously or fraudulently in planning ****560*** this project, the fact remains that one of the project's principal features, if not indeed the chief one, is to provide additional shopping opportunities in the core of the city's shopping area. It is admittedly designed to enhance and to forestall "flight to the suburbs". However well intentioned the project may be, it is obvious that an essential part of it was not authorized by the legislature. That being the case, the City's contentions cannot prevail.

Likewise, the trial court was correct in holding that the project was not a public use.

The judgment is affirmed.

BRACHTENBACH, C. J., and HICKS, WILLIAMS and DORE, JJ., concur.

STAFFORD, Justice, concurring.
I agree with the majority. The Westlake project is primarily a private undertaking, intended fundamentally for private use. As such the City may not, under article 1, section 16 of the Washington Constitution, acquire land for the project through eminent domain proceedings. That resolves the sole issue.

The balance of the majority's opinion embarks on a discussion of whether there is statutory authority to permit such action. I fear such discussion may foster an erroneous impression that the Legislature may have the power to ***635*** authorize condemnation proceedings for private projects or to delegate such authority to municipalities. The state constitution expressly prohibits the taking of any property for a project which is primarily private in nature. Legislative pronouncements to the contrary are meaningless and the presence or absence thereof are unnecessary to a resolution of the case before us.

I also concur with the observation of the majority that the instant case is not in conflict with In re Port of Seattle, 80 Wash.2d 392, 495 P.2d 327 (1972). There, the Port's project fell within a specific constitutional provisions declaring a public use for a public purpose. Article 8, section 8 (amendment 45) reads in relevant part:

The use of public funds by port districts in such manner as may be prescribed by the legislature for industrial development ... shall be deemed a public use of a public purpose ...

In the instant case no constitutional declaration of a public use for a public purpose exists. If it did and if it had the constitutionally authorized legislation we would have a different case. Unfortunately,

the City of Seattle does not have the same constitutional support as the Port of Seattle.

Thus, I concur with the majority solely on the constitutional grounds it expresses.

UTTER, Justice (dissenting).
The Westlake Project will serve a "public use"; and, as designed, it is constitutionally and statutorily permissible. The trial court's finding of no public use, see finding of fact No. 8, is in effect an erroneous conclusion of law which is not binding upon us. The legally requisite public use is not vitiated by the private use or purchase of condemned property. By holding otherwise the majority overrules In re Port of Seattle, 80 Wash.2d 392, 495 P.2d 327 (1972), and Miller v. Tacoma, 61 Wash.2d 374, 378 P.2d 464 (1963). It also undermines the public purpose analysis of United States v. Town of North Bonneville, 94 Wash.2d 827, 621 P.2d 127 (1980), and Anderson v. O'Brien, 84 Wash.2d 64, 524 P.2d 390 (1974).

***636** I

The project is for a public use, as evident from both the substance and the chronology of the other factual findings. The trial court found that the project would forestall inner-city decay, would create necessary public space, and would result in a museum, a public park, public parking, an auditorium, and a library. It specifically found:

4. The City of Seattle intended that creation of an urban focal point as designed for the Westlake Project would, among other things, relocate and improve the monorail terminal, create public parks and open spaces, increase diverse pedestrian traffic in the area, increase city tax ****561** revenues, possibly decrease crime in the area by reason of the pedestrian traffic, create accessible shopping, transportation and recreational facilities for the handicapped, create a center of activity for Seattle, and increase civic pride, all as more particularly described in Ordinance 108591. It appears that there is a reasonable prospect that the Westlake Project would accomplish many of these purposes.

5. The retail shops within the Westlake Project are a substantial element of the project and are an essential part of the Westlake Project and this urban focal point. The retail element of the project cannot be separated from the Project's other elements in the project as now designed to make the project economically feasible and to accomplish the intended purpose of the design.

7. The City's reason for acquiring the entire site for the Westlake Project, and controlling the entire development was its belief that public ownership of the underlying land is necessary for implementation of the public improvements and for assuring that such new private development as might take place on the Project site will be functionally, operationally, architecturally and aesthetically compatible with, and complementary to, the public facilities.

8. The Westlake Project as designed is not a public use.

Finding No. 8 does not follow from findings 4, 5, and 7, and, in fact, appears inconsistent with them. By itself, it offers no reason for its pronouncement; it ***637** only reflects the trial court's erroneous understanding of the law. These findings do not, therefore, support a conclusion of no public use.

II

The majority's constitutional analysis is predicated upon a literal reading of State ex rel. Puget Sound Power & Light Co. v. Superior Court, 133 Wash. 308, 233 P. 651 (1925). But that case, besides being distinguishable from this one, does not require the majority's result and, if it did, it would be inconsistent with recent constitutional developments.

Puget Sound is factually distinguishable. Unlike this case, it did not involve a private use necessary to effectuating a public purpose. At issue was the ability of a power company to construct transmission

lines to provide electricity for both private and public consumption. The court repeatedly emphasized that the company had surplus generating capacity even without the condemnation.

The facts of Puget Sound illustrate that the broad language of that case, upon which the majority relies, cannot be given a literal application. Other cases applying the Puget Sound analysis make this clear. See, e.g., Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 P. 199 (1910); State ex rel. Harris v. Superior Court, 42 Wash. 660, 85 P. 666 (1906); see also Tacoma v. Humble Oil & Refining Co., 57 Wash.2d 257, 356 P.2d 586 (1960); State v. Larson, 54 Wash.2d 86, 338 P.2d 135 (1959); State ex rel. Eastvold v. Superior Court, 48 Wash.2d 417, 294 P.2d 418 (1956). For example, in Nisqually Power, Tacoma was permitted to condemn certain lands and water rights for the purpose of generating electric power, even though during nonpeak hours a substantial amount of that power was to be sold to private enterprise. Both public and private uses were involved; but, because the public use necessarily required an arrangement of that sort, the condemnation was permissible. That case reflects the long-standing principle, not repudiated by Puget Sound, that any taking is constitutional if reasonably ***638*** necessary to the effectuation of a public use. See also Humble Oil, supra; Larson, supra; Eastvold, supra.

Moreover, our recent cases indicate that we no longer follow, if we ever did, the majority's use of Puget Sound. A condemnation is not illegal simply because private enterprise is allowed to either purchase or lease the acquired land. See, e.g., ****562*** In re Port of Seattle, 80 Wash.2d 392, 495 P.2d 327 (1972); Miller v. Tacoma, 61 Wash.2d 374, 378 P.2d 464 (1963).

As long as the object sought to be accomplished is for a public purpose, it is for the legislature to determine the means to accomplish it.... The fact that private enterprise may be selected to effectuate the plan ... does not make the purpose ... a private one.

(Italics mine.) Port of Seattle, 80 Wash.2d at 396, 495 P.2d 327, citing Miller, 61 Wash.2d at 387, 378 P.2d 464. A condemnation is not invalid, even though private enterprise may subsequently purchase or lease the acquired land, provided such effectuates a public purpose. Port of Seattle, 80 Wash.2d at 397, 495 P.2d 327; Miller, 61 Wash.2d at 387, 392, 378 P.2d 464; see also United States v. Town of North Bonneville, 94 Wash.2d 827, 621 P.2d 127 (1980); Anderson v. O'Brien, 84 Wash.2d 64, 524 P.2d 390 (1974). Simply stated, the current test is whether the advantage to private enterprise is part of a single, inseparable plan benefiting the public. See generally Note, An Expanded Use of Excess Condemnation, 21 U.Pitt.L.Rev. 60 (1959). If so, the condemnation is constitutional.

This current interpretation of article 1, section 16 (amendment 9) simply reflects the changing nature of our society. It has been observed that:

The principle of private ownership of land is deeply imbedded in our democratic system of government, yet it has never been denied that the principle is subject to the power of the government to take land for public use. During the first century of our constitutional society, great wealth was tied up in land and even the man of moderate wealth depended on his land for security. It is not suprising, therefore, that the power of the government to take private land was construed strictly. In our modern society most of the wealth is invested in corporate***639*** and government securities rather than in land, and while private land ownership is still an important characteristic of free government, it seems natural that the limitation on that principle, namely the power of the government to take land for public use, should be interpreted more liberally. Our experience with the democratic form of government with its separation of powers assures us that we need not fear abuse of power so long as certain safeguards surround the power.

Note, supra, at 70. Accord, Kansas City v. Liebi (In re Kansas City Ordinance No. 39946), 298 Mo. 569, 252 S.W. 404 (1923).

Both Miller and Port of Seattle reflect those changing conditions. In Miller, we upheld the constitutionality of urban renewal projects whereby blighted areas, and some peripheral, unblighted areas, were condemned and later resold to private developers. Similarly, in Port of Seattle, we upheld a port's plan to condemn certain land, to construct air cargo facilities upon it, and then to lease them

to private enterprise. In each the condemnation was lawful because the private use facilitated a public purpose.

Miller, Port of Seattle, and their predecessors are therefore not necessarily inconsistent and none bars the Westlake Project. Our cases are also not inconsistent with the general rule followed elsewhere. A synthesis of state and federal law reveals that land may be condemned:

(1) to enable government to carry on its functions, and to preserve the safety, health and comfort of the public, whether or not its individual members may use the property so taken, provided the taking is by a public body; (2) to serve the public with some necessity or convenience of life required by the public as such and which cannot readily be furnished without the aid of the government, whether or not the taking is by a public body, provided the public may enjoy such service as of right; and (3) in special and peculiar cases, sanctioned by custom or justified by the existence of unusual local conditions, to enable individuals to cultivate their land or carry on business in a manner not otherwise possible, if their success will indirectly enhance the public welfare, even though the taking is by a private individual and the public has no right to ***563** the enjoyment of the property ***640** taken or to service from him.

County of Essex v. Hindenlang, 35 N.J.Super. 479, 490, 114 A.2d 461 (1955); 2A J. Sackman, Nichols on Eminent Domain 7-47 (rev. 3d ed. 1980).

It is significant that states with constitutions similar to ours have taken a "liberal" approach. Arizona, Colorado, and Missouri appear to permit any condemnation which benefits the public. In re Kansas City Ordinance No. 39946, supra; Tanner v. Treasury Tunnel Mining & Reduction Co., 35 Colo. 593, 83 P. 464 (1906); Oury v. Goodwin, 3 Ariz. 255, 26 P. 376 (1891). They do not follow the majority's stringent "public use" approach.

Furthermore, as we have frequently stated, the definition of "public use" evolves with the changing needs of society. In Miller, we wrote:

it may fairly be stated ... that judicial interpretation of "public use" has not been circumscribed in our State by mere legalistic formulas or philological standards. On the contrary, definition has been left, as indeed it must be, to the varying circumstances and situations which arise, with special reference to the social and economic background of the period in which the particular problem presents itself for consideration. Moreover, views as to what constitutes a public use necessarily vary with changing conceptions of the scope and functions of government, so that to-day there are familiar examples of such use which formerly would not have been so considered. As governmental activities increase with the growing complexity and integration of society, the concept of "public use" naturally expands in proportion.

Miller, 61 Wash.2d at 384-85, 378 P.2d 464 quoting Carstens v. Public Util. Dist. No. 1, 8 Wash.2d 136, 142, 111 P.2d 583, cert. denied, 314 U.S. 667, 62 S.Ct. 128, 86 L.Ed. 533 (1941).

The Westlake Project is one attempt to resolve public problems now arising. It is an attempt to revitalize downtown retail corridors, to provide needed public space, and to confer cultural benefits. It is an attempt to innovatively create a satisfying downtown environment in response to contemporary downtown problems. As acknowledged by the ***641** trial court:

The Westlake Project is intended by the designer and legislative body to perform some of the same functions, in the contemporary urban setting, that in earlier and simpler times were performed by public squares or commons.

Finding of fact No. 41.

The Westlake Project is therefore, in its simplest terms, a contemporary public square. Consequently, as there is authority to condemn for public squares, RCW 8.12.030, and since the private use is necessary for the plan, the project is constitutional.

III

Conceived as such, the majority's statement that there is no statutory authority for the condemnation sought in this case is a play with words that is not accurate.

A municipal corporation has only those condemnation powers conferred to it by statute. State ex rel. Devonshire v. Superior Court, 70 Wash.2d 630, 424 P.2d 913 (1967); Tacoma v. Welcker, 65 Wash.2d 677, 399 P.2d 330 (1965). But those powers extend to the evident purpose of the legislative grant. Id. As we cautioned in Devonshire, 70 Wash.2d at 633, 424 P.2d 913:

a statutory grant of such power is not to be so strictly construed as to thwart or defeat an apparent legislative intent or objective.

Accordingly, a municipal corporation has the power to take and develop land if pursuant to a statutory end. In evaluating any condemnation, " 'courts look to the substance rather than the form, to the end rather than to the means.' " State ex rel. Puget Sound Power & Light Co. v. Superior Court, supra, 133 Wash. at 312, 233 P. 651.

There is statutory authority to condemn land for public squares, public markets, public parks, public auditoriums, art museums, public parking, and recreational areas. RCW 8.12.030; 35.21.020; 35.21.400; 36.34.340. ***564** These are all elements of the Westlake Project. And as reflected by the findings, the private enterprise component, which concerns ***642** the majority, is simply the means to accomplish the public end.

While the majority concedes express statutory authority for condemnation to further all the above-mentioned purposes, it insists "there is no express statutory authority for the proposed project-a retail shopping center". Majority opinion at 557. Insistence on this frame of reference stems from the majority's judgment that the "evidence shows, as the trial court found, that the primary purpose of the undertaking was to promote the retail goal." (Italics mine.) Majority at 557. It is one thing to say that the retailing aspect of the project is "substantial" and "essential" to the project. Majority at 557, Finding of fact No. 5. This is only to express what the municipality openly avows-that the interdependence of public and private entities is required for the success of the venture. But to say the retailing aspect of the project is "the primary purpose" of the project is to make a judgment about the facts, not to represent them.

In United States v. Town of North Bonneville, 94 Wash.2d 827, 621 P.2d 127 (1980), both sides agreed that the town's purchase of property "for streets, parks, and service facilities constitutes a public purpose." Id. at 834, 621 P.2d 127. Nevertheless, it was also "undisputed that the 'mode of use' for a portion of the property the town wishe(d) to purchase from the Corps (was) not municipal in nature." Id. at 833, 621 P.2d 127. We found a public purpose to the proposed purchase, stating:

(I)f the primary object is to subserve a public municipal purpose, it is immaterial that, incidentally, private ends may be advanced. Moreover, the public purposes for which cities may incur liabilities are not restricted to those for which precedent can be found, but the test is whether the work is required for the general good of all the inhabitants of the city. But it is not essential that the entire community, or even a considerable portion of it, should directly enjoy or participate in an improvement in order to make it a public one.... (T)he test of a public purpose should be whether the expenditure confers a direct benefit of reasonably general ***643** character to a significant part of the public, as distinguished from a remote or theoretical benefit.

(Footnotes omitted.) Id. at 834, 621 P.2d 127, quoting 15 E. McQuillin, Municipal Corporations s 39.19, at 31-32 (3d ed. 1970).

Unlike the court in Bonneville, the majority here deems the private aspect of this project is not incidental to the public uses. It concedes that if the private use were incidental, "a different question would be presented," citing Miller, supra, and In re Port of Seattle, supra. Majority at 559. The majority's reliance on these cases, I believe, misconceives the nature of the term "incidental" as it is

used in those opinions and as it has since been construed by this court. The majority interprets the term "incidental" as a quantum reference: if most of the use is public then a small concomitant of private use may be deemed incidental. The cases do not bear out the majority's use of the term.

In Miller, supra, we did state "(T)he subsequent transfer of land to private parties is ... 'merely incidental to the main public purpose.' " Id., 61 Wash.2d at 388, 378 P.2d 464. But we also stated such resale or lease provisions were "an essential and continuing part of the public purpose." Id. at 387, 378 P.2d 464, quoting Velishka v. Nashua, 99 N.H. 161, 106 A.2d 571 (1954). The private aspect of the urban renewal project at issue in Miller was an integral part of the public purpose, and yet we deemed it incidental.

In In re Port of Seattle, supra, again we stated that the lease of cargo facilities to private enterprise was "incidental to the main public purpose" of providing air cargo facilities. We stated:

The fact that private enterprise may be selected to effectuate the plan for providing air cargo facilities does not make the purpose of providing those facilities a private one.... "Perhaps if the sole purpose***565** of acquiring the property was to lease it to an individual or corporation for private use, its acquisition and lease would be in violation of the (constitution)."

Id., 80 Wash.2d at 396-97, 495 P.2d 327, quoting in part ***644** Paine v. Port of Seattle, 70 Wash. 294, 318, 322, 126 P. 628, 127 P. 580 (1912). The meaning of this language from Port of Seattle is that substantial leasing might occur to "effectuate" a public purpose. Even if there were a large number of privately leased cargo facilities, that private "means" would still be incidental to the overarching public purpose of providing air cargo facilities. While substantial and necessary for the effectuation of a public purpose, such leasing, as with the resale of property in Miller, would be "incidental."

More recently, in Bonneville, supra, we reaffirmed the true meaning of the term "incidental" in this context. In that case, we deemed "incidental" the substantial resale to private entities of property purchased by the municipality. Resale to private parties was thought "incidental" because "a large portion of the acquired property would go to undisputedly municipal uses as streets, parks, and service facilities", Bonneville, 94 Wash.2d at 839, 621 P.2d 127, thus conferring "a direct benefit of reasonably general character to a significant part of the public..." Bonneville, at 834, 621 P.2d 127, quoting 15 E. McQuillin, Municipal Corporations s 39.19, at 31-32 (3d ed. 1970).

Applying these principles to this case, we must first concede the retailing aspect of the Westlake Project constitutes a substantial portion of the project; the amount of property to be leased by the city to be devoted to retailing is not insignificant. But the magnitude of such activity does not make it any less "incidental" to the public purpose being served. The "different question" the majority seeks to avoid through its analysis is squarely presented in this case, and it is answered by our previous cases.

"Public need, as a primary purpose behind joint projects must, of course, be recognized." PUD 1 v. Taxpayers, 78 Wash.2d 724, 729, 479 P.2d 61 (1971). Such a public need and use is easily identifiable in the Westlake Project. A public square in the downtown area is both needed and a valid public use for which the municipality has express statutory authority to condemn property. While the question of public use is a judicial one, even the majority concedes this is a ***645** public use.

The municipality deemed it a necessary incident of that public use that substantial leasing to private retailers occur. That private activity is "incidental" (although both substantial and necessary) to the direct public benefit conferred by the project.

We have previously stated that determination of the means by which a public purpose is achieved is essentially a legislative question. In re Port of Seattle, 80 Wash.2d 392, 396, 495 P.2d 327 (1972). So it is in this case; the municipality is in a much better position than this court to determine what balance of private and public is necessary to the success of an accepted public purpose.

What is a public municipal purpose is not susceptible of precise definition, since it changes to meet

new developments and conditions of times.

United States v. Town of North Bonneville, 94 Wash.2d 827, 833, 621 P.2d 127 (1980), quoting 15 E. McQuillin, Municipal Corporations s 39.19, at 32 (3d ed. 1970).

In meeting the challenge of changing urban conditions, municipalities need flexibility in pursuing accepted legislative goals. It is not the role of the judiciary to impose its judgment on the wisdom of those goals. Private shopping centers must conform to an extent with the public interest. Alderwood Associates v. Washington Environmental Council, 96 Wash.2d 230, 635 P.2d 108 (1981). Are we now to deny municipalities the opportunity to integrate private and public energies to serve the good of the public in our urban centers?

DIMMICK and DOLLIVER, JJ., concur.

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59 Wash.2d 586, 369 P.2d 503
(Cite as: 59 Wash.2d 586, 369 P.2d 503)

KING COUNTY v. THEILMAN
WASH. 1962

Supreme Court of Washington, Department 1.
KING COUNTY, a municipal corporation for the State of Washington, Plaintiff,
v.
Jack THEILMAN, Defendant and Relator,
The Superior Court of the State of Washington for King County; Theodore S. Turner, Judge, Respondent.
No. 36136.

March 1, 1962.

Condemnation proceeding. The Superior Court, King County, Theodore S. Turner, J., entered an order in which was inherent decision that court did not have power to pass upon question of 'necessity' for taking, and condemnee sought certiorari. The Supreme Court, Weaver, J., held that 'necessity' must exist, whether taking is by state or by county, and that necessity for taking is judicial question which must ultimately be decided by court.

Reversed.

West Headnotes

[1] Eminent Domain 148 ⚿264

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k264 k. Review on Certiorari. Most Cited Cases
Supreme Court denied motion to quash writ of certiorari for review of order entered in condemnation proceeding where law applicable to motion to quash was intertwined with law pertaining to merits of cause.

[2] Eminent Domain 148 ⚿1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k1 k. Nature and Source of Power. Most Cited Cases
Power of eminent domain is attribute of sovereignty and is inherent power not derived from, but limited by, fundamental principles of constitution. Const. art. 1, § 16 as amended, amend. 9.

[3] Eminent Domain 148 ⚿56

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation. Most Cited Cases
The phrase "public use" is sufficiently broad to include an element of "necessity", and taking must be "necessary" even when it is county which seeks to condemn. Const. art. 1, § 16 as amended, amend. 9; RCWA 8.04.070, 8.08.040.

[4] Eminent Domain 148 ⚿66

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k66 k. Jurisdiction of Courts in General. Most Cited Cases
Whether taking is "necessary" and for "public use" are judicial questions which must ultimately be decided by court. Const. art. 1, § 16 as amended, amend. 9; RCWA 8.04.070, 8.08.040.

[5] Eminent Domain 148 ⚿19

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k19 k. Highways or Other Roads or Ways. Most Cited Cases
Generally, acquisition of private property for purpose of constructing and maintaining public highway is taking for "public use", but whether

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Documents:	1
Images:	1

public "necessity" for such taking exists must be determined by facts of each case. Const. art. 1, § 16 as amended, amend. 9; RCWA 8.04.070, 8.08.040.

[6] Eminent Domain 148 ⚿56

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k56 k. Necessity for Appropriation. Most Cited Cases
Developer which had highway frontage and two feasible ways of approach could not have condemned property as private way of necessity.

[7] Eminent Domain 148 ⚿61

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k60 Taking for Private Use
148k61 k. In General. Most Cited Cases
Where taking was county's in name only, and ultimate effect was to allow land developer to take private property for private use, public use and necessity did not require condemnation, and action of county board was sufficiently arbitrary and capricious to "amount to constructive fraud." Const. art. 1, § 16 as amended, amend. 9; RCWA 8.04.070, 8.08.040.

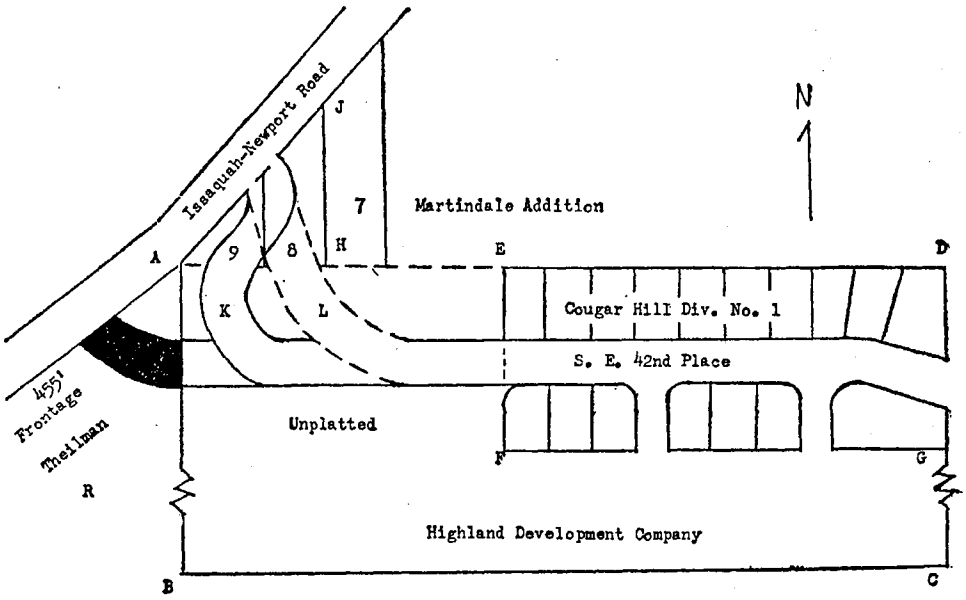
***587 **503** Maslan, Maslan & Hanan, Ben A. Maslan, Seattle, for relator.
Charles O. Carroll, Pros. Atty., Dominick V. Driano, Asst. Chief Civil Deputy, Seattle, for respondent.
WEAVER, Judge.
This is a condemnation proceeding, authorized by the Board of County Commissioners of King County, to acquire land owned by relator.

By writ of certiorari, relator presents for our review an order of the trial court determining that the right of way '* * * sought to be appropriated and used is really and in fact a public use. * * *'

***588 **504** [1] The law applicable to respondents' motion to quash the writ is so intertwined with the law pertaining to the merits of the cause that we deny the motion and proceed to a consideration of the merits. See First National Bank of Everett, Washington v. Tiffany, 40 Wash.2d 193, 242 P.2d 169 (1952).

A chart best portrays the factual situation.[FN1]

FN1. Chart drawn by the court from exhibits and testimony. Not drawn to scale.



The relator, Jack Theilman, owns a 13-acre tract of land, labeled 'R,' that has approximately 455 feet of frontage on the south side of the Issaquah-Newport Road. On the east, his property adjoins a 36-acre tract, 'A-B-C-D,' owned by the Highland Development Company of which Ben A. Van Etten, Sr., is president. The 36-acre tract has no frontage on the Issaquah-Newport Road; however, the Highland Development Company owns lots 8 and 9 of the Martindale Addition, ' A-H-J,' that are contiguous to the northern boundary of 'A-B-C-D' at its northwest corner. Thus, the Highland Development Company has approximately 400 feet of frontage on the highway.

Originally, the Highland Development Company filed a comprehensive plan that proposed a plat of its entire 36-acre tract, plus lots 8 and 9 of the Martindale Addition. The plat extended S.E. 42nd Place east and west; the western end curved to the north through lots 8 and 9 to provide access to the Issaquah-Newport Road, as indicated by 'K.' The proposed plat was approved by the County Engineer's office and the King County Planning Commission.

The northeast portion of the development company's tract was later platted as Cougar Hills Division No. 1. The remainder of the tract is still unplatted, except that S.E. 42nd Place is designated as extending in a straight line through the unplatted portion to the common boundary of the Highland Development Company's tract and relator's land.

The purchase of that portion of relator's property needed to extend S.E. 42nd Place to the Issaquah-Newport Road (the shaded area on the chart, supra) did not materialize.

***590 **505** In its petition for condemnation, the county asked the court to find that the property '* * * is required and *necessary* for a public use * * *.' (Italics ours.)

At the trial, the county presented its case upon the theory of public use and '*necessity*.'

After all of the evidence had been produced,

counsel for the county was confronted with a dilemma arising from the following:

(a) Although Mr. Van Etten denied that this action was commenced by the county at his request, the assistant county engineer testified:
'* * * and I think it is realistic to say that Mr. Van Etten requested that we assist him in this acquisition.
'As a matter of fact, I think there is correspondence to that effect, that he requested that we assist him in this acquisition because he was unable to reasonably negotiate with Mr. Theilman for this property.'

He further testified:
'A. Well, at the present time we do not have any funds budgeted for the construction of this road with County forces, with County funds.'

(b) The cost of the possible condemnation award to relator was to be paid by the Highland Development Company if 'within reason.'

Mr. Van Etten also testified:
'* * * We can't pay for it if it was far in excess, because we can always chop this road off right here. [He was apparently referring to S.E. 42nd Place where it meets the west line of 'A-B-C-D'.]

'If the county would let us we can chop it off right here, same as we would on these-Southeast 43rd Street and Southeast 44th we have chopped off right here. [On the proposed comprehensive plan, these two streets lie south of S.E. 42nd Place and terminate at the west line of 'A-B-C-D'.]'

(c) The cost of construction of the proposed road across relator's land was to be paid by the Hghland Development Company. paid by the Highland Development Company.

(d)The*591 record is replete with evidence to support the conclusion that the Highland Development Company could build an equally satisfactory extension of S.E. 42nd Place over either of two routes across its own lots 8 and 9 of the Martindale Addition to the Issaquah-Newport Road. The first route, as approved by the County Planning Commission and the County Engineer's office on the developer's preliminary comprehensive plan, is designated 'K' on the chart, supra; the second is illustrated by 'L' on the chart, supra. In reference to the latter route, the company's president testified on cross-examination:
'Q. That might hurt some of your proposed lots, might it not? A. It would definitely hurt plenty, that is right.'

(e) Prior to taking the case under advisement, the trial court stated:
'* * * I am of the opinion that if the court has the power to pass on the necessity of the land in question for the purpose of establishing a connecting road from Southeast 42nd Place to Newport Way, *I would have to find against the necessity of the property of the defendant here.* It could be said to be necessary *only* if we start out with the assumption that the interested party initiating this improvement with the County Commissioners should be held entitled to preserve all his building lots without sacrifice. If you are going to have a straight road on Southeast 42nd Place and keep all the building sites, both north and south of the proposed road, intact, then you have got to go across the defendant's property to get a satisfactory grade. But I don't think that is necessary. I don't think you have to spoil a nice piece of property like the Theilman property here in order to provide a satisfactory grade when by changing the route **506 slightly and putting in a cut and a turn on the Van Etten [Highland Development Company] property you can get an equally satisfactory road with an equally satisfactory grade. * * *' (Italics ours.)

The dilemma was apparent: Either the county's action must be dismissed because it failed to prove that the taking of relator's property was 'necessary,' or the county must prevail on its contention that it was not the function of the court to pass upon the question of 'necessity.' Counsel for *592 the

county chose the latter horn; he moved for a trial amendment, deleting the allegation of 'necessity' from the condemnation petition, and waived the request for 'an order of public necessity.'

The trial judge isolated one of the questions of law presented by this review when he said:
'* * * If an order of necessity is still necessary und er the 1949 Act then your motion [by the County] would not be well taken and to grant it would put the county out of court.'

The trial court granted the county's motion to delete a finding of 'necessity'; hence, the order that was entered, which is now under review, determines that the property sought by the county is for a 'public use.' The order is silent, however, as to 'necessity' except to recite that the Board of County Commissioners found relator's property to be ' necessary.' Inherent in the decision of the trial court is the conclusion that, under the applicable statutes, it did not have the power to pass upon the question of the 'necessity' of taking relator's land in support of a public use.

[2] The right of an individual to own, use, and enjoy private property is basic in our philosophy of government. Absent nonpayment of taxes, maintenance of a public nuisance, constitutional rights, or police power, ownership may be disturbed only by the sovereign, for the power of eminent domain is an attribute of sovereignty. It is an inherent power of the state; not derived from, but limited by, the fundamental principles of the constitution.

The pertinent provision of the Washington Constitution is amendment 9 to Art. I, § 16:
'Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made * * *.
Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined ***593** as such, without regard to any legislative assertion that the use is public: * * *.'

Before the *state* may condemn private property, the proper authority must find that its acquisition is '* * * deemed *necessary* for the public uses of the state * * *' (RCW 8.04.010) (Italics ours.) and the court must determine that its acquisition '* * * is really *necessary* for the public use of the state, * * *.' RCW 8.04.070. (Italics ours.)

In State ex rel. Sternoff v. Superior Court, 52 Wash.2d 282, 325 P.2d 300 (1958), a condemnation action by the state, this court held that under RCW 8.04.070 there must be three basic findings before land can be condemned for public use: (1) that the use is really a public use; (2) that the public interests require it; and (3) that the property appropriated is necessary for the purpose. See State ex rel. Bremerton Bridge Co. v. Superior Court, 194 Wash. 7, 76 P.2d 990 (1938).

The legislature gave *counties* the right to acquire private property by eminent domain when the Board of County Commissioners '* * * deems it *necessary* for ****507** county purposes * * *.' RCW 8.08.010. (Italics ours.)

Upon a hearing, if the court
'* * * shall be * * * satisfied by competent proof that the contemplated use for which the lands * * * sought to be appropriated is a public use of the county, the court or judge thereof may make and enter an order adjudicating that the contemplated use is really a public use of the county * * *.' RCW 8.08.040 (Laws of 1949, chapter 79, § 4).

[3] In view of our constitutional provision, quoted supra, we do not believe there is any difference between RCW 8.04.070, requiring the court to find that land acquisition '* * * is really *necessary* for the public use of the state, * * *' and RCW 8.08.040 requiring the court to find '* * * that the contemplated use is really a public use of the *county* * * *.' (Italics ours.) See State ex rel. Flick v. Superior Court, 144 Wash. 124, 257 P. 231 (1927);

***594**State ex rel. McPherson Brothers Co. v. Superior Court, 148 Wash. 203, 268 P. 603 (1928) (Condemnation by counties); State ex rel. Tacoma School District No. 10 v. Stojack, 53 Wash.2d 55, 64, 330 P.2d 567, 70 A.L.R.2d 1064 (1958), and cases cited.

We cannot believe that the legislature intended a requirement that the state could not maintain an action for eminent domain without proving ' necessity' to the satisfaction of the court; and, at the same time, intended a delegation of the power of eminent domain to a political subdivision without such requirement.

Although not determinative, we recognized this conclusion in Public Utility Dist. No. 1 v. Washington Water Power Co., 43 Wash.2d 639, 641, 262 P.2d 976, 977 (1953), when we said:
'Although there are minor differences in the various procedural statutes, as they apply to the several types of authorities empowered to exercise the right of eminent domain, the statutes are collected in State ex rel. Mower v. Superior Court, supra [43 Wash.2d 123, 128, 260 P.2d 355 (1953)], all of the statutes embrace the same procedural theory, namely, a completed action of eminent domain requires the entry of three separate and distinct judgments during the course of the proceeding. [Citing authorities.]
'*The first is a decree of public use and necessity.* It is a judicial question whether the contemplated use be really public. Washington Constitution, Amendment No. 9. The second is a judgment fixing the amount of the award. The third is the final decree transferring title. * * *' (Italics ours.)

The words 'public use' are neither abstractly nor historically capable of complete definition. 'Public use' and 'necessary' cannot be separated with scalpellic precision, for the first is sufficiently broad to include an element of the latter. Can it be daid that a 'contemplated use' that does not include an element of 'necessity' meets the constitutional mandate that it 'be really public'? We think not.

[4] The constitutional provision that '* * * the question whether the contemplated use be really public shall ***595** be a judicial question * * *' does not preclude the prerogative of a legislative or administrative body from declaring a public use in the first instance, and its declaration '* * * is entitled to great weight * * *' (Hogue v. Port of Seattle, 54 Wash.2d 799, 817, 341 P.2d 171 (1959)); however, whether '* * * the contemplated use be really public * * *' is solely a judicial question and ultimately must be decided by the court. Hogue v. Port of Seattle, supra; State ex rel. Andersen v. Superior Court, 119 Wash. 406, 205 P. 1051 (1922) ; Public Utility Dist. No. 1 v. Washington Water Power Co., 43 Wash.2d 639, 262 P.2d 976 (1953); State ex rel. Dungan v. Superior Court, 46 Wash.2d 219, 279 P.2d 918 (1955).

****508** On numerous occasions, this court has announced that
'* * * The rule is well settled in this state that a declaration of necessity by the proper municipal authorities is conclusive, in the absence of actual fraud *or such arbitrary or capricious conduct as would amount to constructive fraud.* State ex rel. Northwestern Electric Co. v. Superior Court for Clark County, 1947, 28 Wash.2d 476, 183 P.2d 802, 173 A.L.R. 1351, and cases cited. * * *' (Italics ours.) State ex rel. Church v. Superior Court, 40 Wash.2d 90, 91, 240 P.2d 1208 (1952).

[5] As a general rule, it must be conceded that the acquisition of private property for the purpose of constructing and maintaining a public highway is for a 'public use,' within the meaning of the constitution and RCW 8.08.020. Inherent, however, in the determination of public use of a piece of property sought to be taken, is an element of public necessity. The rule must be applied to the facts of each case.

[6] We find the facts of the instant case bizarre, if not unique. From the record, it is apparent that the Highland Development Company could not have condemned relator's property as a private way of necessity; the company had highway frontage and two feasible ways of approach. Though we do not think the county's participation in taking relator's property by eminent domain is a cloak to cover ***596** private objectives, the effect of this action is to

allow a private party to do indirectly that which the law forbids him to do directly. The ultimate effect is to allow a neighboring land developer to take private property for a private use. This action is the county's in name only. It had no funds budgeted either to acquire relator's land or to build the road across it.

[7] The record cannot support a conclusion that public use and necessity require condemnation of relator's property; hence, the action of the Board of County Commissioners was sufficiently arbitrary and capricious to 'amount to constructive fraud.'

The judgment is reversed.

FINLEY, C. J., and HILL, HUNTER and FOSTER, JJ., concur.
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